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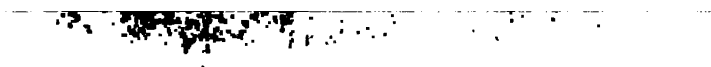
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THE
AMERICAN REPORTS:
CONTAINING
ALL DECISIONS OF GENERAL INTEREST
DECIDED IN
THE COURTS OF LAST RESORT
OF THE
SEVERAL STATES.

WITH
NOTES AND REFERENCES
BY
ISAAC GRANT THOMPSON.

VOL. V.

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*The term of office of Mr. Chief Justice BREESE expired on the sixth day of June, 1876, and thereupon Mr. Justice LAWRENCE, being the oldest justice in commission became chief justice. On the same day Mr. Justice BREESE was re-elected, in the First Grand Division, for the term of nine years.

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HIRAM WARNER.

* BROWN, Ch. J., resigned in December, 1870, and LOCHRANE, Ch. J., was appointed in January, 1871.

LIST OF JUDGES.

5

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WILLIAM WHITE,
LUTHER DAY,
JOSIAH SCOTT,
GEORGE W. McILVAINE.

* AMES, Ch. J., died in December, 1865, and BRADLEY, Ch. J., was elected in February, 1866.

† BRINKERHOFF, Ch. J., previous to February 8, 1871; SCOTT, Ch. J., subsequent to that time.

TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Adams v. Clem	584	Commonwealth, Erie Railway v.....	351
Adams v. Waggoner.....	350	Commonwealth v. Pennsylvania Canal	
Aldrich v. Drury.....	684	Co.....	350
Alford, Killough v.....	349	Commonwealth, Pittsburg, Fort	
Allen v. McCullough.....	37	Wayne, etc., Railway Co. v.....	344
Alter's Appeal	433	Connor v. Southern R. Co.....	543
Anderson, Zimmerman v.....	447	Coolidge v. Hager	355
Andrews, Bradford v.....	645	Copley, Schuykill Co. v.....	441
Armstrong Co. v. Clarion Co.....	303	County of Schuykill, McHugh v.....	445
Atchison, Taylor v.....	113	Crocheron, Haddock v.....	344
Atkins v. Johnson	350	Culton, Pattison v.....	150
Baddeley, T. & W. R. R. Co. v.....	71	Davis v. Munson	315
Bailey v. Godfrey	197	Deere & Co., Candee, Swan & Co. v....	135
Ball, Mangun v.....	436	Dickens' Case	430
Bartholomew v. St. Louis, Jacksonville,		Dodge v. National Bank	643
etc., R. R. Co.....	45	Donley v. Tindall.....	334
Batchelder v. Low	311	Draper v. Hill.....	303
Baxter, Brewer v.....	530	Drury, Aldrich v.....	684
Beatty v. Locoming Co. Mut. Ins. Co....	313	Dunn and another, Self v.....	544
Bell, Hubbard v.....	93	Dunn, Home Life Ins. Co. v.....	643
Bellefontaine Railway Co. v. Hunter ..	301	Dunn v. Johnson.....	177
Bellis, Frink v.....	193	Dunn, Klumph v.....	355
Bingham, Gibson v.....	339	Elliott v. Locoming Co. Mut. Ins. Co.,	333
Bostwick, Camp v.....	699	Ellis v. Wire.....	139
Boynton v. Farmers' Mut. Ins. Co.....	376	Equitable Life Ins. Co. v. Paterson....	535
Bradford v. Andrews.....	645	Erie Railway Co. v. Commonwealth...	351
Brewer v. Baxter.....	530	Espy, Ross v.....	304
Brower, Spencer v.....	354	Evans, Rhine's Adm'rs v.....	354
Brumfield v. Carson	134	Farmers' Mut. Ins. Co., Boynton v	376
Bunn, Robbins v.....	75	Farmers' Mut. Ins. Co., Plympton v....	397
Burch, Miller v.....	343	Ferrell v. Oxford Fire & Life Ins. Co..	436
Camp v. Bostwick	699	First National Bank of Greenfield v.	
Candee, Swan & Co. v. Deere & Co.....	135	Marietta & Cin. R. R. Co.....	655
Carson, Brumfield v... ..	134	Fix, Illinois Mut. Fire Ins. Co. v.....	38
Chaffee, Wade v.....	573	Fleming, Jarnigan v.....	514
Chancellor & Murray, Gilliam v.....	493	Forder, Wilson v.....	627
Chicago & Alton R. R. Co. v. Murphy..	43	Forgue, Kerr v.....	145
Chicago & Alton R. R. Co. v. Randolph..	60	Foy & Florer, Parker v	434
Chicago & Northwestern R. R. Co. v.		Frankenburgh, Illinois Central R. R.	
Simonsen	155	Co. v.....	93
Clarion Co., Armstrong Co. v.....	303	Friedlander v. Pugh, Slocum & Co....	173
Clarke, Martin v.....	536	Frink v. Bellis.....	193
Cleveland & Pittsburg Railway Co.,		Funk v. Smith	323
Colton v.....	434	Garrard v. Haddan	413
Colton v. Cleveland & Pittsburg Rail-		Garvey, Trustees v	51
way Co.	434		

PAGE.	PAGE.
Gibson v. Bingham..... 269	Killough v. Alford..... 248
Gilliam v. Chancellor & Murray..... 498	Kirk, Slack v..... 438
Godfrey, Bailey v..... 187	Kincald's Appeal..... 377
Goodrich v. Tracy..... 281	Kleine, Hegger & Co. v. Katzenberger & Co..... 68
Gould v. Stevens..... 265	Klumph v. Dunn..... 255
Grave, Phillips v..... 275	Lamar Ins. Co. v. McGlashen..... 122
Gray & Bell v. Scott..... 371	Larkin, Wead v..... 142
Gulce v. Sellers..... 476	Lewis, Pool v..... 528
Haddock v. Crocheron..... 244	Lindsay, Negley v..... 427
Haddan, Garrard v..... 412	Locke, Stoddard v..... 205
Hager, Coolidge v..... 256	Low, Batchelder v..... 311
Hammond, Toledo, Wabash, etc., R. Co. v..... 221	Lycorning Co. Mut. Ins. Co., Beatty v..... 318
Hard, Quinn v..... 284	Lycorning Co. Mut. Ins. Co., Elliott v..... 328
Harding, Mousler v..... 195	Mangum v. Ball..... 436
Harding v. Town of Townshend..... 304	Marietta & Cin. R. R. Co., First Nat. Bank of Greenfield v..... 655
Harris v. Social Manuf. Co..... 549	Martin v. Clarke..... 586
Hartford Fire Ins. Co. v. Walsh..... 115	Mayor and Aldermen of Savannah, O'Byrne v..... 522
Hartford, Prov., etc., R. R. Co., National Exchange Bank v..... 582	Mauran v. Smith..... 564
Hartford, Providence, etc., R. R. Co. Taft v..... 575	McClellan, Illinois Cent. R. R. Co. v..... 88
Hartford, Prov., etc., R. R. Co., Whitaker v..... 547	McCullough, Allen v..... 37
Hedrick, Johnson's Administrators v..... 191	McEwen v. Jeffersonville, Madison, etc., R. R. Co..... 216
Hill v. Wilker..... 540	McGlashen, Lamar Ins. Co. v..... 122
Hitt, Draper v..... 232	McGoon v. Shirk..... 123
Holbrook and Roosevelt, Meara's Administrator v..... 628	McHugh v. County of Schuylkill..... 445
Holzgrafe, Winneshiek Ins. Co. v..... 64	McLellan v. Jenness..... 270
Homan v. Stanley..... 389	Meara's Administrator v. Holbrook and Roosevelt..... 628
Home Life Ins. Co. v. Dunn..... 642	Mayfield v. Moore..... 52
Hooper v. Welch..... 267	Miller v. Burch..... 243
Hopplin v. Jenckes..... 597	Miller, Tilton v..... 378
Hubbard v. Bell..... 98	Montgomery, Jacqua v..... 166
Hunter, Bellefontaine Railway Co. v..... 301	Moore, Mayfield v..... 53
Illinois Cent. R. R. Co. v. Frankenberg..... 92	Moss, Phelan v..... 408
Illinois Cent. R. R. Co. v. McClellan..... 88	Mousler v. Harding..... 195
Illinois Cent. R. R. Co. v. Slatton..... 109	Munson, Davis v..... 315
Illinois Mut. Fire Ins. Co. v. Fix..... 38	Murphy, Chicago & Alton R. R. Co. v..... 42
In the Matter of Reynolds..... 615	National Ex. Bank, Dodge v..... 648
Jarnigan v. Fleming..... 514	National Ex. Bank v. Hartford, Prov., etc., R. R. Co..... 522
Jacqua v. Montgomery..... 168	Negley v. Lindsay..... 437
Jeffersonville, Madison, etc., R. R. Co., McEwen v..... 216	O'Byrne v. Mayor and Aldermen of Savannah..... 522
Jenckes, Hopplin v..... 597	Odom, Tedder v..... 25
Jenness, McLellan v..... 270	Oxford Fire and Life Ins. Co., Ferrel v..... 436
Johnson's Administrators v. Hedrick, 191	Palaret's Appeal..... 450
Johnson, Atkins v..... 280	Parker v. Foy & Florer..... 484
Johnson, Dunn v..... 177	Paterson, Equitable Life Ins. Co. v..... 525
Jones v. Wagner..... 385	Pattison v. Culton..... 199
Katzenberger & Co., Kleine, Hegger & Co. v..... 630	Peckham, Taylor v..... 378
Kellogg Montgomery v..... 508	Penn. Canal Co., Commonwealth v..... 329
Kerr v. Fargue..... 146	Pennsylvania R. R. Co. v. Riblet..... 329

TABLE OF CASES REPORTED.

9

PAGE.	PAGE.
Phelan v. Moss..... 408	St. Louis, Jacksonville, etc., R. R. Co., Bartholomew v..... 45
Phillips v. Graves..... 675	Stoddard v. Locke..... 308
Pindar, Toledo, Peoria and Warsaw Railway Co. v..... 57	Sweet, Ritchie v..... 245
Pittsburgh, Fort Wayne, etc., Railway Co. v. Commonwealth..... 344	Sykes v. Town of Pawlet..... 295
Plimpton v. Farmers' Mut. Ins. Co..... 297	T. & W. R. R. Co. v. Baddeley..... 71
Pool v. Lewis..... 528	Taft v. Hart., Prov., etc., R. R. Co..... 575
Pottmeyer, State v..... 224	Taylor v. Atchison..... 118
Pugh, Slocumb and Co., Friedlander v. 478	Taylor v. Peckham..... 578
Quinn v. Hard..... 284	Taylor v. Staples..... 556
Ragsdale, Whitney v..... 185	Tedder v. Odom..... 25
Randolph, Chicago and Alton R. R. Co. v..... 60	Thomas, Simmons v..... 470
Reynolds, Stitzell v..... 394	Tillinghast v. Wheaton..... 621
Rhine's Admrs v. Evans..... 364	Tilton v. Miller..... 373
Riblet, Penn. R. R. Co. v..... 360	Tindall, Donley v..... 224
Ritchie v. Sweet..... 245	Toledo, Peoria & Warsaw Railway Co. v. Pindar..... 57
Robbins v. Bunn..... 75	Toledo, Wabash, etc., R. R. Co. v. Ham- mond..... 221
Ross v. Espy..... 391	Town of Pawlet, Sykes v..... 295
Schnorr's Appeal..... 415	Town of Townshend, Harding v..... 304
Scott, Gray & Bell v..... 371	Tracy, Goodrich v..... 281
Scott, Tuthill v..... 301	Trustees v. Garvey..... 51
Schuykill Co. v. Copley..... 441	Tuthill v. Scott..... 301
Self v. Dunn and another..... 554	Wade v. Chaffee..... 572
Sellers, Gulce v..... 478	Waggoner, Adams v..... 230
Shirk, McGoon v..... 122	Wagner, Jones v..... 385
Shreck v. Shreck..... 251	Walsh, Hartford Fire Ins. Co. v..... 115
Simmons v. Thomas..... 470	Wead v. Larkin..... 149
Simmons, Chicago & N. W. R. R. Co. v. 155	Webb, Widdoe v..... 664
Slack v. Kirk..... 438	Welch, Hooper v..... 297
Slotton, Ill. Cent. R. R. Co. v..... 109	Wheaton, Tillinghast v..... 621
Smith, Funk v..... 393	Whitaker v. Hartford, Prov. & Flahkil R. R. Co..... 547
Smith, Mauran v..... 564	Whitney v. Ragsdale..... 185
Social Manufacturing Co., Harris v..... 549	Widdoe v. Webb..... 664
Southern Express Co., Conner v..... 548	Wilker v. Hill..... 540
Spencer v. Brower..... 264	Wilson v. Forder..... 627
Stanley, Homan v..... 389	Winneshek Ins. Co. v. Holzgrafe..... 64
Staples, Taylor v..... 556	Winningham, Wright v..... 35
State v. Pottmeyer..... 224	Wire, Ellis v..... 189
Stevens, Gould v..... 295	Wright v. Winningham..... 35
Stitzell v. Reynolds..... 395	Zimmerman v. Anderson..... 447

TABLE OF CASES CITED.

PAGE.	PAGE.
Abbott v. Allen..... 477	Austin v. Trustees of University..... 454
Abbott v. Macfie..... 149	Antrobus v. Smith..... 587, 589
Abrams v. Pomeroy..... 68	Avery v. Halsey..... 361, 363
Academy of Fine Arts..... 352	Ayres v. Hartford Ins. Co..... 378
Acheson v. Miller..... 261	Ayres v. Hutchins..... 404
Ackerley v. Villas..... 643, 645	
Adair v. Shaw..... 33, 34	Bachelor v. Heagan..... 187
Adams v. Bowen..... 665	Backhouse v. Harrison..... 405, 406, 408, 410
Adams Ex. Co. v. Haynes..... 97	Bagg's Appeal..... 457, 458
Adams v. Jones..... 510	Bailey v. Bidwell..... 268
Adams v. Nichols..... 84	Bailey v. Bussing..... 261
Adams v. Rowan..... 667	Bailey v. Freeman..... 458
Adams v. Story..... 615	Bainbridge v. Wade..... 241
Adams v. Williams..... 427	Baker v. Kelly..... 506
Adamson v. Jarvis..... 361, 363, 368	Baker v. Wheeler..... 121
Adamson v. Lamb..... 561	Baldwin v. Am. Express Co..... 94
Adm'rs of Gilbert v. Adm'rs of Little, Adm'rs of Backus v. McCoy..... 150, 151	Baldwin v. Mann..... 459
Esna Ins. Co. v. McGuire..... 70	Baldwin v. Palmer..... 665
Esna Fire Insurance Comp'y v. Tyler, Albaugh v. James..... 198	Balfourd v. Bond..... 873
Aldredge v. Great Western E'way Co..... 668	Bailou v. Farnum and others..... 654, 655
Aldrich v. Aldrich..... 76	Baltimore v. Railroad..... 832
Alexander v. Alexander..... 399	Bambaugh v. Bambaugh..... 451, 452, 467
Alger v. Lowell..... 569	Bank v. Archer..... 380
Allaire v. Hartshorne..... 404	Bank v. Fordyce..... 394
Allegre v. Maryland Insurance Co..... 353	Bank v. Knoup..... 341
Allen v. Hudson River Mut. Ins. Co..... 89	Bank v. Neal..... 267
Allen v. McPherson..... 434	Bank v. Nolan..... 393
Allen v. Miles & Adams..... 471	Bank of Albion v. Smith..... 448
Allen v. Sewall..... 655	Bank of Easton v. Commonwealth..... 352, 353
Allen v. Willard..... 360, 362, 364	Bank of North America v. McKnight..... 407
Allen v. Williams..... 229	Bank of Penn. v. Commonwealth, 350, 353
Allen v. Wooley..... 159	Bank of St. Albans v. Farmers' and Mechanics' Bank..... 238
Almgren v. Dutlih..... 242	Bank of State of Missouri v. Phillips..... 238
Alston v. Mechanics' Mut. Ins. Co..... 67	Bank of U. S. v. Russel..... 412
Althorf, Adm., v. Wolfe..... 308	Banks v. Ammon..... 456
American River Water Co. v. Amsden, Ames v. King..... 123	Baptist Church v. Brooklyn Fire Ins. Co..... 67
Ames v. Norman..... 27, 32	Baptist Church of Hartford v. Wet-herell..... 338
Amoskeag Manufacturing Company v. Spear..... 126, 128, 143, 145	Barclay R. R. v. Ingraham..... 106
Anderson v. Blaseby..... 508	Barclay v. Thompson..... 366
Anderson v. Lincoln..... 477	Barclay v. Weaver..... 396
Andres v. Hoppenhefer..... 396, 399, 400	Bardell v. Jamaica..... 580
Andrew v. Pearce..... 150	Barger v. Barger..... 396
Angel v. Smith..... 684	Barger v. Caldwell..... 242
Argiaz v. Munbaugh..... 430	Barger v. Cochran..... 646
Armstrong v. Armstrong..... 434	Barker v. Havens..... 218
Armstrong v. Tolor..... 361, 665, 668	Bartlett v. Union Ins. Co..... 319
Armstrong v. Treasurer of Athens Co..... 330	Barnard v. Moriant..... 603, 606
Arndt v. Arndt..... 433	Barnard v. Poor..... 187
Arnold v. Clifford..... 305, 309	Barnes v. Seigneur Ward..... 604, 606
Aspdin v. Austin..... 84	Barnes v. Ward..... 656
Arria v. Stukely..... 54	Barney v. Goff & Cady..... 260
Atkinson v. Brooks..... 284	Barnum v. Vandusen..... 57
Atkinson v. Patton..... 521	Barrett v. Nosworthy..... 436
Attorney-General v. Pearson..... 417	Barrett v. Stow..... 243
Attorney-General v. Wilson..... 360	Barrett v. Union Mut. Fire Ins. Co..... 67
Atwood v. Reliance Trans. Co..... 426	Barringer v. Boyd..... 476
Auditors of Wayne County v. Benoit..... 56	Barran v. Eldridge..... 157
Auglinbaugh v. Coppenheffer..... 385	Barry v. Bennett..... 241
Aurand v. Wilf..... 434	Barry v. Lowell..... 157
	Bartholomew v. Candee..... 150

PAGE	PAGE
Hartlett v. Pickersgill..... 590	Bliss v. Negus..... 668
Harto v. Schmeck..... 438, 439, 440	Blossom v. Griffin..... 241
Barton v. Fetherolf..... 365	Blumenthal v. Blumenthal..... 637, 640
Barton v. McKelway..... 242	Blydenburg v. Welsh..... 430, 445
Bas v. Chicago & Burlington, etc., R. Co..... 57	Board of Supervisors v. Davenport..... 188
Baston v. Tatham..... 357	Boardman v. Keeler..... 479
Bates v. State..... 226	Boland v. Missouri R. R. Co..... 149
Bates v. Tappan..... 310	Bolton v. Johns..... 454
Bates v. Watson..... 665, 666	Boltou v. Martin..... 612
Bawson v. Donovan..... 657	Bomar v. Maxwell..... 656
Datta v. Purvis..... 599	Borough of Carlisle v. Marshall..... 351
Batty v. Duxbury..... 590	Bosanquet v. Dudmon..... 404
Baty v. Sale..... 76, 77	Boston, etc., Corporation v. Newman..... 451
Bauer v. Roth..... 443	Boston, Concord, etc., R. R. Co v. State, 361
Baugh v. Price..... 430	Boulter v. Clark..... 232
Bavington v. Pittsburg & Steubenville R. R. Co..... 428	Bowditch v. Balchin..... 574
Bay v. Coddington..... 404	Bowen v. Lease..... 330
Baylis v. Attorney-General..... 424	Bowen & Seymour v. Joy..... 642
Baxter v. Troy & Boston R. R. Co..... 211	Boyd v. McIvor..... 267
Beach v. Parmeter..... 426	Boyer v. Davis..... 561
Beal v. Morris..... 655	Boynton v. Tidwell..... 573
Beal v. Thompson..... 84	Brace v. Yale..... 226
Bean v. Green..... 98	Bradley v. Hunt..... 638
Beardsley v. Knight..... 150	Bradley v. Norton..... 126
Beaumont v. Fell..... 424	Bradley v. Rea..... 542
Beebe v. Johnson..... 84	Bradley v. Washington, etc., Steam Packet Co..... 241
Beck v. Stizel..... 356	Braman v. Roberts..... 404
Beckman v. Shouse..... 93, 426	Brass v. Maitland..... 656
Beckwith v. Philby..... 574	Breckenridge v. Mellon..... 476, 479
Bedell v. The Long Island R. R. Co..... 60, 157	Brecknock Co. v. Pritchard..... 84
Beddoes, Ex'r, v. Wadsworth..... 150, 153	Bredin v. Bredin..... 442
Beehler v. Steever..... 359	Brehme v. Adams Ex. Co..... 83
Beekman v. Saratoga R. R. Co..... 452	Brewer v. Hastie..... 254
Begler v. Waller..... 255	Brick Presbyterian Church v. Mayor..... 382, 394
Beisiegel v. N. Y. Central R. R. Co..... 211	Bridge Co. v. Kline..... 445
Belfast, etc., Rway Co. v. Keys..... 658	Brill v. Stiles..... 76
Beil v. Drew..... 658	Britton v. Bishop..... 206
Beil v. Hansley..... 232	Brockway v. Crawford..... 574
Beil v. Joseph..... 67	Bronson v. Adams..... 146
Beil v. Ohio & Penn. R. R. Co..... 331	Bronson v. Rodes..... 124, 259
Beil v. Tombigbee R. R. Co..... 471	Brook v. Hook..... 147
Belmont Branch Bank v. Hoge..... 287, 404	Brooke v. Pickwick..... 337
Beltzhoover v. Blackstock..... 404, 499	Brooker v. Coffin..... 378
Bemey v. Turner..... 499	Brooklyn White Lead Company v. Masury..... 126, 136
Benedict v. Stewart..... 580	Brooks v. Gally..... 430
Benior v. Paquin..... 266	Brown v. Anderson..... 670
Benner v. Manlove..... 76	Brown v. Bowen..... 227
Bennett v. Byram..... 84	Brown v. Brown..... 623
Bennett v. Dutton..... 93	Brown v. Burns..... 242
Bennett v. Farrar..... 76	Brown v. Chadbourne..... 93, 101, 106
Bennett v. Miller..... 655	Brown v. Corey..... 355, 451, 460
Bentz v. Armstrong..... 386	Brown v. Godfrey..... 316
Berkshire Woolen Co. v. Proctor..... 655, 657	Brown v. Hummel..... 351, 359, 360, 454
Berry v. Carle..... 108	Brown v. Jackson..... 386
Resburg v. Graham..... 404, 410	Brown v. Lent..... 654
Betta v. Gibbins..... 261, 268, 363, 370	Brown v. Lynn..... 572
Bickel's Ex'rs v. Fassig's Adm'rs..... 442, 444	Brown v. Maxwell..... 146
Bigelow v. Weston..... 579, 580	Brown v. Mississippi..... 469
Biddle v. Starr..... 361	Brown v. Mott..... 404
Billings v. Billings..... 442	Brown v. Murphee..... 354
Billings v. Hall..... 422	Brown v. Sax..... 151
Billings v. Wing..... 400	Brown v. Street..... 410
Bininger v. Waffles..... 126	Browne v. Scofield..... 93, 106
Birch v. De Peyer..... 242	Browning v. Hunt..... 631
Bird v. Randall..... 304, 306	Brush v. Scribner..... 404, 406
Birge v. Gardiner..... 143, 149	Brydon v. Stewart Marg..... 334, 343
Bissell v. Morgan..... 234	Buckingham v. Smith..... 227
Black v. Card..... 561	Buckley v. Garrett..... 436
Blackmore v. Bristol & Exeter Railway Co..... 656	Buffalo v. Halloway..... 369
Blair v. Corby..... 243	Buffalo Steam Engine Works v. Sun Mut. Ins. Co..... 82, 46
Blaise v. Freeland..... 451	Bulkeley v. N. Y., etc., R. R. Co..... 351
Blanchard v. Baker..... 275	Bullock v. Dommitt..... 84
Blanchard v. Russell..... 615	Bullock v. Narrott..... 161
Blandy v. Widmore..... 502	Bullock v. Wilcox..... 404, 405, 409, 445
Blanton v. King..... 499, 501	Bumburger v. Clippinger..... 468
Blewett v. Tregonning..... 223	Bumpas v. Platner..... 477

TABLE OF CASES CITED.

13

PAGE.	PAGE.
Burditt v. Swenson..... 243	Charles River Bridge v. Warren Bridge, 836
Burges v. Butgess..... 126	Charleston Ins. Co. v. Rose..... 39
Burges v. Clark..... 451	Chase v. Hamilton Mut. Ins. Co..... 67
Burges v. Clements..... 525	Chase v. Manhardt..... 254
Burke v. Broadway R. R. Co..... 372	Chaurand v. Angerstein..... 243
Burnett v. Phalon..... 126	Chenault v. Chenault..... 28
Burns v. Erben..... 574	Cheney's Case..... 498
Burns v. Sutherland..... 561	Chesley and others v. Thompson..... 275
Burr v. Burr..... 28	Chesterfield v. Janssen..... 431
Burrell v. Clarke..... 510	Chicago v. Robbins..... 390
Burt v. Dodge..... 623	Chicago & Mississippi R. R. Co. v. Patchen..... 211, 659
Burton v. Burton..... 490	Chicago & Alton R. R. Co. v. Gretzner, 239
Bush v. Bush..... 436	Chicago & Alton R. R. Co. v. Keefe..... 49
Butcher v. London & South-western Railway Co..... 657	Chicago & Aurora R. R. Co. v. Thompson..... 658
Butter v. Horwitz..... 124	Chicago, Burlington, etc., R. R. Co. v. Coleman..... 67
Butterfield v. Forrester..... 206	Chicago, Burlington, etc., R. R. Co. v. Dewey..... 148
Butterfield v. Western R. R. Co..... 212, 215	Chicago, Rock Island, etc., R. R. Co. v. Fairclough..... 47
Button v. Hudson R. R. Co..... 149	Chicago & N. W. Railway Co. v. Goss..... 659
Byers v. Gillespie..... 356	Chicopee Bank v. Chaquin..... 404
Byers v. McClannahan..... 445	Child v. Insurance Co..... 320
C. C. & C. R. R. Co. v. Keary..... 634, 656	Childers v. Dean..... 543
C. & A. R. R. Co. v. Scott..... 46	Chouteau v. Leech..... 35
Cable v. Martin..... 499	Christianson v. Am. Ex. Co..... 426
Cahill v. London & N. W. Railway Co..... 658	Christie v. North British Ins. Co..... 67
Calder v. Bull..... 331	Chubb v. Gsell..... 359
Caldwell v. Fulton..... 335	Church v. Wells..... 332
Caldwell v. Reed..... 478	Citizens' Bank v. Nantucket Steamboat Co..... 658
Caldwell v. Renfrow..... 623	City Council of Charlestown v. The Wentworth First Baptist Church..... 384
Caldwell v. Williams..... 590	City of Chicago v. Mayor..... 149
Call v. Calif..... 149	City of Chicago v. Starr..... 148
Callahan v. Bean..... 404	City of Erie v. Erie Canal, 331, 332, 340, 361
Callen v. Fawcett..... 525	City Fire Ins. Co. of Hartford v. Mark, 36, 41
Camden & Amboy R. R. & Trans Co. v. Belknap..... 46	City of St. Paul v. Kirby..... 149
Camden & Amboy R. R. Co. v. Briggs..... 361	Clapp v. City of Providence..... 590
Camp v. Walker..... 448	Clare v. Maynard..... 454
Campbell v. Boggs..... 333, 354, 355	Clark v. Barnwell..... 65
Campbell v. Butler..... 498	Clark v. Boyd..... 650
Candall v. Shaw..... 470	Clark v. Clark..... 128
Candor's Appeal..... 445	Clark v. Foot..... 385
Canham v. Jones..... 123	Clark v. Inhabitants of Blything..... 306
Carbrey v. Willis..... 257	Clark v. Jetton..... 506
Carleton v. Woods..... 666	Clark v. Marsiglia..... 478, 481
Carlson v. Kenealy..... 449	Clark v. Pease..... 261
Carmac v. Warriner..... 374	Clark v. White..... 490
Carmichael v. Brown..... 499, 501	Clement v. Youngman..... 335
Carnie v. Murphy..... 197	Cliff v. The Midland Railway Co..... 211
Carpenter v. Dodge..... 580	Clute v. Wiggins..... 525
Carpenter v. Tarrant..... 357	Coates v. Holbrook..... 123
Carr v. De Fevre..... 583	Coates v. Mayor of New York, 331, 341, 377
Carr v. Hilton..... 496	Cobb v. Standish..... 580
Carr v. Hinchliffe..... 599	Cochran v. Rethberg..... 242
Carr v. Wallace..... 445	Coe v. C. P. & I. R. R. Co..... 634
Carpenter v. Washington Ins. Co. 39, 273, 438	Coffeen v. Brunton..... 123
Carson v. Blazer..... 330	Coffin v. Coffin..... 598
Carson v. R. R. Co..... 157	Coffin v. Rich..... 380, 454
Carter v. Rockett..... 299	Cogill v. American Exchange Bank..... 650
Carter v. Washington Ins. Co..... 299	Cogg v. Bernard..... 525
Carver v. Adams..... 200, 232	Coggswell v. Lexington..... 590
Cary v. Cleveland & Tol. R. R. Co..... 46	Coheco Manufacturing Co. v. Whittier..... 257
Case of Anne Boleyn..... 537	Coit v. Com. Ins. Co..... 243
Case of Culver..... 610, 612, 614	Colbert v. Caldwell..... 357, 398
Cash v. Giles..... 291	Colburn v. Putnam..... 261
Cassedy v. Stockbridge..... 580	Cole v. Goodwin..... 45
Catis v. Wadlington..... 109	Collins v. Bayntum..... 582
Chaffee v. Jones..... 598	Collins v. Boston & Maine R. R. Co..... 223
Chalmers v. Lanior..... 404	Collins Co. v. Cowen..... 123, 126
Chamberlain v. McAllister..... 478	Collins & McElroy v. Myers..... 631, 632
Chamberlain v. McClurg..... 453, 455, 456	Collins v. Merrill..... 65
Chamberlain v. Murphy..... 304	Collins v. Myers..... 631, 632
Chamberlain v. Sibley..... 593, 572	Collins & Timberlake v. Un. Trans. Co. 213
Chambers v. Wells..... 377	
Chauter v. Hopkins..... 374	
Chapin v. Sullivan R. R. Co..... 625	
Chapin v. Vt. & Mass. R. R. Co..... 583	
Chapman v. Chapman..... 445	
Chapman v. Rothwell..... 656	

	PAGE.		PAGE.
Colt v. Patridge	642	Croft v. Day	198
Colton v. Martin	598	Crook v. Jarris	266, 405, 406, 408
Columbian Ins. Co. v. Lawrence	229	Crosbie v. Hurley	54
Colvin v. Morgan	597, 598	Crosby v. Grant	267
Com. Ins. Co. v. Union Mut.	277	Crosby v. N. L. N. R. E.	588
Commercial Ins. Co. v. Spankneble	117	Cramer v. Higginson	510
Commissioners Hamilton Co. v. Mighels	684	Cubitt v. Porter	274
Commissioners of Knox Co. v. Aspinwall	583, 584	Cumberland Mut. Protec. Co. v. Mitchell	394
Commonwealth v. Alger	543	Cummings v. Barrett	238
Commonwealth v. Cleveland, Painesville, etc., R. R. Co.	348	Cumston v. Lambert	261
Commonwealth v. Cooley	373	Currier v. Lowell	580
Commonwealth v. Cullen	381	Curtis v. Keesler	108
Commonwealth v. Erie & N. E. Rwy Co.	390	Curtis v. The Avon, etc., R. R. Co.	45
Commonwealth v. Hartman	377	Custer v. Commonwealth	377
Commonwealth v. Maxwell	377	Cutter v. Powell	290
Commonwealth v. McWilliams	377	Dadmun Manufacturing Co. v. Worcester Mut. Fire Ins. Co.	278
Commonwealth v. Moitz	445	Dale v. Lyon	514
Commonwealth v. Monongahela Nav. Co.	339	Dale v. Metcalf	425, 454
Commonwealth v. O'Hain	615	Dale v. Roosevelt	237
Commonwealth v. Ohio & Penn. R. R. Co.	444	Daley v. Norwich, etc., R. R. Co.	149
Commonwealth v. Phila. & Reading R. R. Co.	368	Dalzell v. Crawford	423
Commonwealth v. Pittsburgh, etc., R. R. Co.	384	Dalzell v. Taylor	634, 635
Commonwealth v. Reed	381	Dame v. Kenny	360
Commonwealth v. Rogers	443, 444	Daniel v. Wood	382
Commonwealth v. Shaver	443, 444	Daniels v. The People	98
Commonwealth v. Tewksbury	330	Dansay v. Richardson	657
Commonwealth v. Trenton Delaware Bridge Co.	343	Danvers v. Manning	434
Compton v. Jones	144	Dargan v. Waddell	243
Concord R. Co. v. Greeley	451, 454, 456	Dartmouth College v. Woodward	399, 361
Cone v. Baldwin	267	Darwell v. Williams	629
Conger v. Hudson R. R. Co.	83	Dascomb v. The Buffalo & State Line R. R. Co.	209, 215
Congreve v. Smith	390	Davidson v. Graham	84, 96, 657
Conn. & Pass. R. R. Co. v. Holton	626	Davies v. Humphreys	674
Conn. v. Penn.	254	Davis v. Bangor	580
Connell v. Voorhies	694	Davis v. Burnett	261
Conrad v. Farrow	442	Davis v. Garrett	357
Constant v. Insurance Co.	277	Davis v. Hill	580
Cook v. Champlain Trans. Co.	157	Davis v. Mich., etc., R. R. Co.	568
Cooper v. Bragg	98	Davis v. Roberts	498
Cooper v. Farmers' Mut. Ins. Co.	324	Davis v. Russell	573
Cooper v. First Presbyterian Church of Sandy Hill	382	Davis v. Talcott	390
Cooper v. Walker	84	Dawes v. Shedd	670
Cooper v. Williams	227	Dawson v. Chamney	525
Copp v. Sawyer	174	Day v. Arnold	435
Corn Ex. v. Babcock	686	Day v. Day	434
Connecticut M. L. M. Co. v. C. C. & C. R. Co.	583	Dayton v. Pease	656
Cornwall v. Richardson	390	Dearth v. Williamson	436
Corwin v. Daly	126	De Crespigny v. Wellesley	514
Costigan v. The Mohawk and Hudson R. R. Co.	183	Deering v. Chapman	665, 666, 667
Costle v. Durfee	657	Deford v. Miller	357, 366
Cotton v. Ellis	506, 572	De Groot v. Jay	684
County of Beaver v. Armstrong	584	Demarest v. Haring	399
Coursin v. The Penn. Ins. Co.	324	Demill v. Lockwood	492
Courtney v. Ins. Co.	436	Dennett, Petitioner	536
Coventry v. Barton	370	Dennis v. Burritt	441
Cowles v. Dunbar	574	Dent v. Pepps	327
Coxe v. Harden	300	Derrickson v. Cady	371
Coxe v. Helsley	385	Derrutt v. Earl of Winchelsea	84
Craig v. City of Vicksburg	584	Derrutt v. Jones	264
Craig v. State of Missouri	490, 499	De Saussures	561
Craie v. Buchanan	198	De Veaux v. De Veaux	438
Crawford v. Jarret	242	De Wolf v. Rabeud	439
Crawford v. Morrell	666	Dexter v. Clements	443
Crawford v. Northeastern R. R. Co.	577	Dexter v. Faber	398
Crawford v. Wilson	369	Dexter v. The Syracuse, Binghamton, etc., R. R. Co.	224
Crawshaw v. Thompson	128	Dickenson v. Watson	657
Creed v. Hartman	390	Dickey v. Jennison	490
Crenshaw v. The State River Co.	331	Dickinson v. Boyle	57
Criley v. Chamberlain	451	Dickinson v. Gr. Junc. Canal Co.	308
		Dickson v. Legare	234
		Dickson v. Parker	515
		Dickson v. Primrose	410
		Diehl v. Adams Co. Mut. Ins. Co.	320, 322
		Dillon v. Copplin	506
		Dingley v. Boston	481

TABLE OF CASES CITED.

15

PAGE.	PAGE.
Dixon v. Bell 554, 557	Farmers' & Merchants' Bank v. Cham-
Dixon v. Dixon 260, 267	plain Trans. Co. 98
Doe v. Warren 548	Farmers' Mut. Fire Ins. Co. v. Marshall, 67
Dolg v. Barkley 547	Farnin v. Anderson 548
Dole v. Brakine 238, 238	Farnham v. Camden & Amboy R. R.
Donley v. Tindall 248	Co. 436
Dorian v. Sammis 445	Farrand v. Marshall 336
Dorr v. The N. J. S. Nav. Co. 98, 98	Farrant v. Barnes 656, 656
Dorsey v. Smith 55	Fassett v. First Parish in Boylston 338
Doss v. Jones 514	Featherstone v. Hutchinson 566
Dottarar v. Bushey 308, 309	Fenner v. The Buffalo and State Line
Doty v. Knox Co. Bank 636, 636, 638, 639	R. R. Co. 45
Doty v. Willson 261	Fenton v. Dublin Steam Packet Co. 634, 638
Douglas v. Reynolds 510, 511	Ferguson v. Glaze 441
Downey v. Garard 287, 288, 288, 286	Ferguson v. Thomas 681
Dows v. Greene 200	Fetridge v. Wells 136
Doyle v. Kiser 238, 238	Field v. N. Y. C. R. R. Co. 157
Drake v. Beckham 557	Field v. Northern R. R. Co. 684, 641
Draper v. Shute 557	Findlay v. Bear 398
Drury v. Worcester 580	Findon v. Parker 590
Duffy v. Thompson 558	Fink v. Cox 589
Dufour v. Dufour 192	Finley v. Ins. Co. 436
Duivell v. Tyler and others 556	Fish v. Chapman 93
Duncan v. McCullough, 428, 429, 430, 431, 445	Fisher v. Bridges 232
	Fisher v. Delbert 438
Dunklee v. Wilton R. R. Co. 267, 258	Fisher's Ex'rs v. Mossman 646
Dunham v. Lamphere 580	Fiske v. Framington Manf. Co. 451, 460
Durkee v. Mott 478	Fitch v. Carpenter 248
Durach's Appeal 451, 461	Fitchburgh R. R. Co. v. B. & M. R. R.
Dwight v. Whitney 385	Co. 157
	Evans v. Nicholls 261
Eagle v. White 98	Flemington v. Smithers 78
Eagle Bank v. Smith 288	Fletcher v. Harcutt 261
Eames v. State 574	Fletcher v. Jackson 671
Earl of Athol v. Earl of Derby 605, 609	Fletcher v. Peck 235
Earl of Glasgow v. The H. & C. Alum	Fletcher v. Rylands 57
Co. 386, 387	Fogg v. Middlesex Ins. Co. 39
Earle v. Shaw 277	Foley v. Mason 385
East St. Louis v. Louisiana St. John 451	Folsom v. Belknap Ins. Co. 277
Eastern Bridge Co. v. Northampton Co. 348	Fonnerreau v. Poyntz 434
Eastern v. Commonwealth 330, 361	Forbes v. Hall 79
Eaton v. Benton 499	Forbes v. Parker 331
Eaton v. Whitaker 557	Ford v. Williams 61, 688
Eckart v. Wilson 367, 398	Ford's Lessee v. Sangel 646
Edgerton v. Huff 220	Forrest v. Forrest 27
Edmunson v. Drake 510	Foster v. Equitable Mut. Fire Ins. Co. 39
Edwards v. Jones 404, 560	Foster v. Jack 314
Elder v. Burrus 109	Fowler v. Dorion 658
Elliot v. Fitchburg R. R. Co. 226	Fowler v. Dowdney 357
Ellcott v. Martin 267, 404	Fowler v. Fowler 499
Ellis v. McCormick 442	Fowler v. McCarthy 500
Ellis v. Nemmo 560	Fowler v. Poling 150, 153
Ellsworth v. Foggy & Harvey 394	Fox v. Harding 183
Elzey v. State 515	Fox v. Kilton 159
Elmore v. Naugatuck R. R. Co. 98	Francis v. Ocean Insurance Co. 320
Emans v. Turnbull 228	Frankford & B. T. Co. v. The Phila-
Emerson v. Clayton 470, 474	delphia & I. R. Co. 385
English v. N. H. & Northampton Co. 330	Franklin Ins. Co. v. Updegraff 319, 321
Epley v. Witherow 445	Freeman v. Ransom 631
Epps v. Hinds 656	Freiligh v. Platt 333
Erie & N. E. R. R. Co. v. Casey 381	Fremantle v. Lans & U. West Railway
Erie v. Schwingle 368	Co. 656
Ernst v. Hudson R. R. Co. 209	French v. Brunswick 580
Ervine's Appeal 451, 452, 453, 467	French v. Carhart 242
Espy v. Anderson 437, 432	Frink v. Schroyer 73
Evans v. Merriweather 227	Frisbee v. Langworthy 159
Evans v. Lee 327	Frith v. Barker 385
Evans v. Tibbins 398	Fritz v. Commissioners 442
Evart v. Kerr 189	Frost v. Portland 579, 580
Ex parte Bellows 310	Frye v. Potter 599
Ex parte Bloxham 404	Fullerton v. McArthur 377, 451
Ex parte Gifford 674	Fulton v. Hood 445
Ex parte James 615, 616, 618, 619	Fulton v. Wood 442
Ex parte Pye Dupont 500	
Ex parte Reid 310	Gage v. Shelton 400
Faber v. Faber 126	Gainford v. Tuke 357
Fancourt v. Thorn 448	Gale v. Cooper 260, 298
Farina v. Silverlock 126	Galena & Chicago Un. R. R. Co. v. Dill, 211
Far. & Mech. Bank v. Hathaway. 284, 286	Galena & Chicago Union R. R. Co. v.
	Loomis 210, 211

PAGE.	PAGE.
Gamble v. Grimes.....	665
Ganson v. Madigan.....	242
Gardner v. Gardner.....	676
Garland v. Lape.....	206
Garland v. Stewart.....	615
Garrett v. Felt & Reed.....	471
Garrett v. Gonter.....	442, 445, 446
Garrigues v. Harris.....	445
Gaskell v. Morris.....	827
Gay v. Baker.....	882
Gelpeke v. City of Dubuque.....	584
George v. Harris.....	51
Gerard v. Bates.....	656, 657
Gerrish v. Towne.....	241
Getty v. Rountree.....	874
Gibbons v. Paynter.....	658
Gibbons v. Pepper.....	657
Gibbs v. Chispane.....	547
Gibbs v. Dewey.....	399
Giddens v. Mirk.....	406
Giles v. Fauntleroy.....	525
Gilhooley v. The New York & Savannah Steam Nav. Co.....	46
Gill v. Cubitt.....	297, 405, 406, 408, 409, 410
Gillan v. Hutchinson.....	454
Gillespie v. Worford.....	38, 32
Gillott v. Esterbrook.....	126
Gillman v. Peck.....	283
Gillman v. Philadelphia.....	331
Gillman v. Sheboygan.....	352
Gilpin v. Smith.....	477
Girard v. Gettig.....	428
Given v. Driggs.....	261
Glascock v. Lyons.....	55
Glassey v. Hestonville, etc., R. R. Co.....	149
Glendale Woolen Manufacturing Co. v. Protection Ins. Co.....	67
Glenn v. Cuttle.....	384
Goepps' Appeal.....	429
Golt v. The Ins. Co.....	436
Goldsmith v. Goldsmith.....	502
Goodman v. Harvey.....	298, 405, 406, 407, 408
Goodman v. Simons.....	297, 404, 407
Goodman v. Stephens.....	404
Goodspeed v. Fuller.....	590
Goodtitle v. Toombs.....	273
Goodyear v. Rambaugh.....	470, 474
Gordon v. Appeal Tax Court.....	341, 353
Gordon v. Longest.....	842
Gosling v. Morgan.....	355, 398, 399
Gould v. Boston Dock Co.....	227
Gould v. Hill.....	93
Gould v. Stevens.....	411
Gout v. Aleplogu.....	128
Goudley v. Duncombe.....	595, 601, 608, 610
Grace v. Adams.....	428
Graft v. Bloomer.....	428
Graham v. Davidson.....	84, 93
Graham v. Gillespie.....	414
Graves v. American Ex. Bank.....	650, 651
Graves v. Tucker.....	441
Gray v. Bidwell.....	631
Gray v. Donahoe.....	448
Gray v. Harper.....	242
Gray v. May.....	646
Gray v. McCance.....	76, 78
Gray's Adm'rs v. Bank of Kentucky.....	410
Great Northern Railway Co. v. Shep- herd.....	283, 697, 698
G. W. Railroad Co. v. Thompson.....	659
Green v. Creighton.....	471, 499
Green v. Humphrey.....	442
Green v. James.....	180
Green v. North Buffalo Turnpike.....	442, 443
Green v. Oakes.....	98
Greenough v. Balch.....	665
Greenby v. Willocks.....	150
Greening v. Wilkinson.....	191
Greenland v. Chaplain.....	687
Greenough v. Greenough.....	434, 436, 454
Gregg v. Wyman.....	268
Grenawalt's Appeal.....	579
Grevenmeyer v. Southern Ins. Co.....	436
Griffin v. Griffin.....	438
Griffiths v. Hardenbergh.....	241
Grim v. School Directors.....	448
Grim v. Weissenberg.....	451
Griswold v. Pratt.....	615, 616, 619
Griswold v. Waddington.....	246
Gros v. Leber.....	484
Grosvenor v. Atlantic Fire Ins. Co.....	39, 40
Growing v. Mendham.....	301
Guille v. Swan.....	667
Gunter v. Astor.....	667
Guthshore v. Chale.....	508
Hackett v. Tilly.....	261
Hackney v. Alleghany Co. Mut. Ins. Co.....	67
Hackshaw v. McCrea.....	478
Hadley v. Baxendale.....	479
Hadley v. Dunlap.....	648
Hadley v. Taylor.....	653
Hagan v. B. & M. Railway.....	623
Hagen v. Essex Co.....	451
Hagen v. Detweiler.....	497
Haldeman v. Bruckhart.....	385
Hall v. Cheney.....	45
Hall v. Davis.....	241
Hall v. Fuller.....	414
Hall v. Hale.....	267
Hall v. Huntton.....	261
Hall v. Ins. Co.....	390
Hall v. Manchester.....	590
Hall v. Smith.....	694, 696
Hall v. Wilson.....	408
Halsey v. Stewart.....	598
Haly v. Lane.....	404
Hamberlin v. Terry.....	499
Hamilton v. McPherson.....	183
Hamilton v. Vought.....	267
Hammer v. McEldowney.....	497
Hand v. Baynes.....	84
Hanseau v. Thornhill.....	428
Harbold v. Kuster.....	428
Harcourt v. Harrison.....	260
Hardington v. Nichols.....	428
Hardy v. Gholson.....	471
Hardy v. Van Harlingen.....	676, 698
Hare v. Horton.....	84
Hargous v. Stone.....	390
Harman v. Abbey.....	681, 682
Harmony v. Bingham.....	84
Harper v. Pounds.....	442
Harris v. Ryding.....	396, 397
Harrisburg v. Meyer.....	404
Harrison v. Berkley.....	667
Hart v. Erie Railway Co.....	216
Hart v. Hammell.....	243
Hartfield v. Roper.....	148, 149
Harvey v. Boles.....	398
Harvey v. Lloyd.....	451
Harvey v. Thomas.....	577, 451, 459, 469
Hastings v. Wiswall.....	545
Hate v. Holly.....	648
Hathaway v. Brayman.....	161
Hathorne v. Ely.....	46
Haup v. Granger.....	648
Havens v. Erie R. R. Co.....	211
Hawkins v. Governor.....	585
Hawkins v. Hoffman.....	686
Haymaker v. Haymaker.....	646
Hays v. Bisher.....	451, 469
Haywood v. Watson.....	404
Hazard v. Robinson.....	367
Hazen v. Essex Co.....	490
Heacock v. Fly.....	434
Helser v. McGrath.....	443
Henderson v. Mitchell.....	499
Henning v. Weckheiser.....	448

TABLE OF CASES CITED.

17

PAGE.	PAGE.
Henry v. The Dubuque and Pacific R. Co. 625	Howe v. Nichols..... 506, 513
Henry v. Flagg..... 548	Howell v. Wilson..... 115
Henry v. The Great Northern Railway, 577	Hoyle v. Zacharie & Turner..... 617
Henry v. R. R. Co. 157	Hughes v. Large..... 446
Henry v. Risk..... 385	Hughes v. Macfie..... 149
Henshaw v. Noble..... 634, 650	Hughes v. Wheeler..... 283
Hepburn v. Curtis..... 361	Hull v. Hill..... 504
Herrl & Co. v. Shultz..... 642	Hull v. Kohlsaat..... 123, 125
Heron v. Hofner..... 422	Hull v. Richmond..... 579
Herrick v. Carman..... 438	Hume v. Tenant..... 673, 679
Hertsmann v. R. R. Co. 157	Humphrey v. Clement..... 123, 125
Hervey v. Morse..... 157	Humphrey Co. v. Armstrong..... 368
Hester v. Young..... 531	Humphries v. Bragden..... 386, 387
Hetrick v. Deuchler..... 528	Hunt v. Knickerbocker..... 665
Hewey v. Nourse..... 60	Hunt v. Penn. R. R. Co. 390
Hewitt v. Hewitt..... 532	Hunt v. Smith..... 508
Hickletter v. McCrea..... 481	Hunt's Cases..... 542
Hickman's Case..... 490	Hurd v. Darling..... 271
Hickox v. Naugatuck R. R. Co. 658	Hutchins v. Western, etc., R. R. Co. 655
Hicks v. Abergavenny, etc., Railway, 304, 307	Hutchinson v. Boggs..... 284, 404, 410
Higgins v. Pitt..... 665	Ide v. Churchill..... 670
Higgins v. U. S. Mail Steamship Co. 84	Ide v. Passumpsic & Conn. River R. R. Co. 589
Higginson v. Alr..... 254	Illinois Cent. R. R. Co. v. Copeland..... 92
Hill v. Buckminster..... 174	Illinois Cent. R. R. Co. v. Frazier..... 155
Hill v. Cooley..... 412	Illinois Cent. R. R. Co. v. Johnson..... 94
Hill v. Cumberland Valley Mut. P. Co. 437	Illinois Cent. R. R. Co. v. McClellan, 57, 149
Hill v. Ely..... 396	Illinois Cent. R. R. Co. v. Mills..... 155
Hill v. Epley..... 445	Illinois Cent. R. R. Co. v. Morrison..... 84
Hill v. Ins. Co. 436	Illinois Cent. R. R. Co. v. Phelps..... 211
Hill v. Meyers..... 327	Illinois Cent. R. R. Co. v. Reedy..... 659
Hill v. Scales..... 445	Illinois Cent. R. R. Co. v. Smyser..... 84
Hinchcliff v. Hinchcliff..... 500	Illinois M. F. Ins. Co. v. O'Nelle..... 68
Hinde v. Vattler..... 436	Indermauer v. James..... 656
Hinds v. Chamberlin..... 666	Indianapolis & Cincinnati R. R. Co. v. McAhren..... 361
Hinton v. Diddin..... 657	Indianapolis & Cincinnati R. R. Co. v. McClure..... 218, 215
Hinton v. Locke..... 242	Indianapolis & Cincinnati R. R. Co. v. Rutherford..... 307
Hiscocks v. Hiscocks..... 434	Ingersoll v. Stockbridge & C. R. R. Co., 157
Hitch v. Davis..... 559	Inhabitants of Worcester v. Eaton..... 227
Hitchcock v. St. John..... 631	Inland Ins. Co. v. Stauffer..... 319, 323
Hite v. Kier..... 423, 432	Inman v. Foster..... 590, 515
Hixon v. Lowell..... 579, 581	In re Davy..... 194
Hogg v. Hatch..... 399	In re Gen. Estates Co. ex parte City B'k..... 449
Hobbs v. Branscomb..... 574	Insurance Co. v. Berger..... 436
Hobson v. Todd..... 275	Insurance Co. v. Cropper..... 436
Hodges v. Shuler..... 449	Insurance Co. v. Helfenstein..... 436
Hogan v. Brown..... 521	Insurance Co. v. Johnson..... 67
Hogden v. Attleborough..... 580	Insurance Co. v. Roberts..... 436
Hoke v. Henderson..... 454	Insurance Co. v. Stewart..... 436
Hoiden v. Bloxum..... 508	Insurance Co. v. Stockbower..... 324, 325
Hoidship v. Souby..... 657	Insurance Co. v. Wright..... 84
Hoidship v. Doran..... 327	Iowa v. Galena, etc., R. R. Co. 361
Hole v. Hittenhouse..... 557	Iron City Bank v. Pittsburgh..... 390, 352
Holly v. Burgess..... 390	Irvine v. Lumbermen's Bank..... 442
Holley v. Mix..... 574	Irwin v. Covode..... 385
Hollingsworth v. City of Detroit..... 547, 563	Ives v. Jones..... 361
Hollister v. Nowlen..... 45	Jack v. Morrison..... 395, 439
Holloway v. Headington..... 580	Jackson v. Rogers..... 561
Holloway v. Lowe..... 589	James v. Emery..... 431
Holly v. Boston Gaslight Co. 149	James v. Methodist Church..... 676
Holmes v. Charlestown Mut. Ins. Co. 67	Jeffreys v. Jeffreys..... 190
Holmes v. Johnson..... 385	Jenkins v. McConico..... 139
Homesberger v. Second Ave. R. R. Co. 148	Jenks v. Fritz..... 451
Honick v. Phoenix Ins. Co. 57	Jessup v. Loucks..... 617
How v. New York and New Haven R. R. Co. 93	Jillies v. Montford..... 353
Hooksett v. Concord R. R. Co. 157	Johnson v. Dickens..... 257
Horach's Adm'r's v. Elder..... 368, 371	Johnson v. Johnson..... 219
Houghtaling v. Kilderhouse..... 360	Johnson v. Jordan..... 673
Houston, etc., R. R. Co. v. Randolph..... 565	Johnson v. New York Cent. R. R. Co. 219
Hovey v. American Mut. Ins. Co. 67	Johnson v. Planters' Bank..... 163, 185
How v. Plainfield..... 580	Johnson v. Sheddson..... 400
Howard v. Bradley..... 548	Johnson v. Shields..... 657
Howard v. Duncan..... 447	Johnson v. Stone..... 581
Howard v. First Parish in North Bridge-water..... 579, 582	Jones v. Boston..... 657
Howard v. North Attleborough..... 579	Jones v. Boyce..... 499
Howe v. Hartness..... 650	
Howe v. Howe Machine Co. 128	

PAGE.		PAGE.	
Jones v. Norwich & New York Trans. Co.	45	Lampman v. Milks	257
Jones v. Tatham	451	Lancashire Wagon Co. v. Pittsburgh	656
Jones v. Thomas	485	Lancaster Canal Co. v. Parnaby	656
Jones v. Tyler	561	Lancy v. Cliford	108
Jones v. Van Patton	183, 478	Lane v. Bryant	205
Jones v. Voorhees	93, 658	Lane v. Colton	634
Jones v. Waite	635, 698	Lane v. Sharp	69
Jones v. Walkup	27, 28	Langdon v. Young	350
Jones v. Waltham	579	Lannen v. Albany Gas Light Co.	149
Jordan v. Fall River R. R. Co.	657	Lanridge v. Levy	656
Jordan v. Meredith	835	Lansdown v. Lansdown	494
Judah v. Harris	448	Larrabee v. Talbot	619
Juniata Bank v. Brown	429	Lash v. Lambert	255
Justices v. Murray	642	Lathrop v. President, etc., of Amherst Bank	564, 569
Kanavan's Case	383	Laugher v. Painter	634
Kanouse v. Martin	642	Law v. Towns	565
Kanster v. Kohans & Visser	610	Lawrence v. Hedger	574
Keeling v. Griffin	460	Lawrence v. Holyoke Ins. Co.	278
Keith v. Easton	579	Lawson v. Weston	405
Kekewick v. Manning	560	Laythorp v. Bryant	185
Keller v. Scott	494	Lazarus v. Ins. Co.	486
Kelley v. Kelley	441	Leame v. Bray	657
Kellman v. Smith	431	Le Conteur v. London Southwest- ern Railway Co.	656
Kellogg v. Chicago & Northwestern Railway Co.	157	Ledwith v. Catchpole	574
Kellogg v. Denslow	20, 200, 201, 374	Lee v. Boak	623
Kellog v. Dickinson	382	Lee v. Dick	510
Kelly v. McCarthy	454	Lee v. Kimball	200
Kelly v. Miller	508	Lee v. Maddox	470
Kendall v. Stockton	565	Leeler v. Vantuyte	445
Kennedy v. Green	496	Lefflore v. Justin	515
Kent v. Shuokard	657	Lehigh Coal & Nav. Co. v. Northamp- ton Co.	364
Kent v. Waite	267	Leinghart v. Forringer	327
Kepler v. Keller	665	Lenere v. Lenere	494
Kernochan v. New York & Bowery Ins. Co.	320	Leonard v. Vredenburgh	438
Kerr v. Kitchen	467	Levy and Wife v. Jardin	470
Kerwhacker v. C. C. & C. R. R. Co.	656	Lewis v. County Chester	551
Keyser v. Keen	442	Lewis v. Elmendorf	567, 613
Kidder v. Dunstable	579	Lewis v. Lewis	624
Kleffer v. Imhoff	385	Lewis v. Reeder	448
Kilcrease v. Lum	484	Lewis v. Rucker	162, 165, 166
Kimball v. Hamilton Fire Ins. Co.	320	License Cases	451
King v. Huggins	57	Lightbody v. N. A. Ins. Co.	67
King v. Lynn	382	Lincoln v. Whittenton Mills	553
King v. Mead v. Paddock	290	Linder v. Barbee	248
King v. State Mut. Fire Ins. Co.	30, 299	Lindville v. Earlywine	356
Kingdon v. Nottle	151	Litchman v. Earl of Carlisle	502
Kingsley v. Wallis	428	Little v. Gibson	449
Kinney v. Hosea	400	Little v. Jarnigan	519, 520, 522
Kirk v. Eddowes	504	Littlejohn v. Jones	545
Kittredge v. Emerson	310	Livingston v. Cox	366
Kittredge v. Warren	310	Livingston v. Livingston	499
Klein's Case	618	Lloyd v. Harvey	504
Kilginsmith v. Kilginsmith's Exr.	670	Lockwood v. Wilkinson	646
Kneass's Appeal	378, 461, 468	Loehner v. Home Mut. Ins. Co.	67
Kneeland v. Rogers	261	Logan v. Austin	333
Kneeling v. Griffin	451	Long v. Adams	508
Knight v. N. E. Worsted Co.	241	Long v. State	574
Knight v. Pugh	404, 410	Longmud v. Halliday	658
Knight's Adm'r v. Quarles	657	Loomis v. Newhall	665, 666
Knight & Co. v. Richmond & Carr.	598, 600	Lormen v. Benson	109
Knox v. Chaloner	108	Lord v. Ocean Bank	404
Knox v. Cleveland	482	Lorizo v. Manufacturing Ins. Co.	39
Kreig v. Wells	148	Louisville, etc., R. R. Co. v. State ex rel. McCarty	182
Lackawana Iron, etc., Co. v. Luzerne County	349, 354	Love v. Buchanan	499, 500
Ladd v. King	590	Lovegrove v. London, Brighton & S. C. Railway Co.	56
Ladlee v. Langham	451	Lowry v. Adams	241
Lady Rodman v. Vandeary	485	Luby v. Hudson River R. R. Co.	305
Lafayette & Indianapolis R. R. Co. v. Huffman	256	Lukehart v. Byerly	346
Lake v. Manford	476	Lumley v. Gye	357
Lalor v. The Chicago, Burlington & Quincy R. R. Co.	49	Lutheran Congregation of Pine Hill v. St. Michael's, etc., of Pine Hill	417
Lambertson v. Hogan	454	Lycoming Ins. Co. v. Schollenberger	324
Lamotte v. Hudson River Fire Ins. Co.	67	Lycoming Ins. Co. v. Schreffler	320
		Lycoming Ins. Co. v. Stockloun	324
		Lycoming Ins. Co. v. Undegraff	320, 322

TABLE OF CASES CITLED.

19

PAGE.	PAGE.
Lyman, adm'r. v. Albe, adm'r. 478	McCormick v. Trotter. 448
Lyman v. Allen 470	McCracken v. Hayward .. 330
Lyman v. Boston & W. R. R. Co. 361	McCuen v. Ludlam 400
Lynch v. Dizell 306	McCullough v. Eagle Ins. Co. 227
Lynch v. Nurdin 149	McCullough v. Houston. 448
	McCullough v. Irvine 385
M. & W. R. R. Co. v. McConnell 157	McDonald v. Bacon 553
Mable v. Mattoon 528	McDonald v. Edgerton 525
Macdonald v. Longbottom 242	McDowell v. Morgan 78
Macbir and wife v. Burroughs 688	McDowell v. Catler 304, 306
Macomber v. Cambridge Mut. Ins. Co. 30	McGatrick v. Wason 634
Macrow v. The Great Western Railway Co. 224	McGee v. Sodusky 308
Mad River R. R. Co. v. Fulton 658	McGee v. Wright 76, 78
Madison & Indianapolis R. R. Co. v. Whiteneck 361	McGehee v. Goodman 248
Mages v. Badger 267	McGinnis v. Watson 417
Magle v. Baker 404, 406	McIntyre v. Hughes 590
Mallady v. Chandler 631	McKnight v. Taylor 557
Maloney v. Kenman 485	McLaughlin v. Commonwealth 439
Mally v. The Reading & Columbia R. R. Co. 347, 351	McLaughlin v. Simpson. 490
Manyan v. Atterton 149	Mead v. Yo. 650
Mann v. Eckford's Exps. 239	Meads v. Rutledge 479
Mann v. Mann 434	Mears v. London & Southwestern Railway Co. 658
Manning v. Clement 514	Meadville v. Erie Canal Co. 339, 350
Manning v. Smith 257, 258	Mechanics' Bank v. New York & New Haven R. R. Co. 583
Manning v. Wells 657	Meek v. Kettlewell 580
Mansfield v. McIntyre 28	Meese & Wife v. Keefe 646
Mapes v. Weeks 514	Mercer Co. v. Hackett 584
Marble v. City of Worcester 658	Merritt v. Brinkerhoff 227
Markle v. Hatfield 288	Messerole v. Tynberg 126
Marriott v. Hampton 495	Merryweather v. Nixan, 261, 264, 308, 309, 370
Mars v. L. & S. W. Railway Co. 656	Meyer v. City of Muscatine 584
Marshall v. Gongler 442	Meyer v. Peck 84
Marshall v. Gridley 68, 69	Michener v. Cavender 442
Marshall v. York, Newcastle & Burwick Railway Co. 657	Micher v. Planters' Bank 470
Marston v. Hobbs 150	Michigan Cent. R. R. Co. v. Hale 84
Martin, Admr. v. Gordon 150	Middleton v. Pritchard 98
Martin v. Baker 194	Miles v. Cattle 358
Martin's Case 603, 604	Miles v. McCulloch 368
Martin v. Duffey 427	Miles v. Van Horn 390
Martin v. Hammon 428, 432	Mill River Manf. Co. v. Smith 230
Martin v. Stillwell 399	Miller's Appeal 428
Martin v. Western Union R. R. Co. 157	Miller v. Fenton 369
Martyn v. Knowllys 272	Miller v. Fitchthorn 398
Mason v. Baret 431	Miller v. Gilleland 412
Mason v. Chappel 374	Miller v. Harden 665
Mason v. Ellsworth 590	Miller v. Henderson 368
Mason v. Hall 619	Miller v. Lockwood 631, 633
Mason v. Salisbury 318	Miller v. Mariner's Church 479, 482
Mason v. Thompson 655	Miller v. Miller 623
Masse v. Matthews 646	Miller v. New York & Erie R. R. Co. 331
Masterson v. Mayor of Brooklyn, 180, 181	Miller v. Parish 400
	Miller v. Rice 405
Matee v. Brown 525	Miller v. Porter 451
Matter of Townsend 452	Miller v. Stevens 242
Matter of Kew 452	Miller v. Wilson 327, 328
Matthew v. Ollerton 232	Millington v. Fox 129
Matthews v. Great Western Railway Co. 577	Mills v. Barber 284
Matthews v. Huntly 390	Mills v. St. Clair Co. 452
Matthews v. Poythress 267, 414	Milner v. Dawson 404
Matthews v. Kitenour 178	Milner v. Milner 434
Matthews v. Warner 433	Milner v. Tucker 290, 291
Mattliwan Co. v. Bentley 431	Miner v. Miner 470
May v. Breed 615	Minor v. C. & N. W. R. R. Co. 48
Mayfield v. Wadeby 628	Miner v. Granger 374
Mayor, etc. of New York v. Brooklyn Fire Insurance Co. 67	Mitchell v. Hewitt 500
Mayor v. Pine 684	Mitchell v. Lyeomng Mut. Ins. Co., 67, 324
May v. Connell 552, 553	Mitcheli v. Oter 94
McAllister v. Reub. 290	Mitchell v. Smith 305
McCabe v. Emerson 454, 482	Mixer v. Reed 239
McCallum v. Mortimer 590	Moles v. Bird 432
McCarty v. Hoffman 434, 435	Mondel v. Steel 290
McClure v. Wilson 51	Monderville v. Stokel 471
McConnell v. Wilcox 78	Monongahela Nav. Co. v. Coon 331
McCoon v. Galbraith 364	Montgomery v. Dealy 357
	Moon v. Mahon 486
	Moore's Appeal 475

PAGE.	PAGE.
Moore v. Appleton..... 251	Noyes v. Rutland R. R. Co. 98
Moore v. Armstrong..... 646	Nusarris v. Kan. 646
Moore v. Meacham..... 205	Nutter v. Stoner 665
Moore v. Merrill..... 150, 153	
Moore v. Sanborne..... 98, 101, 102	O. & M. R. R. Co. v. Shanefelt..... 156
Moore v. Veazie..... 361	Oakland R. R. Co. v. Fielding..... 372
Morgan v. King..... 98, 105, 108	Oaks v. Weller..... 608, 511
Morgan v. Merchants' Ex. Bank..... 650, 651	O'Brien v. Saxon..... 569
Morgan v. Painter..... 470	Odiome v. Lyford..... 275
Morgan v. Vale of Heath Railway Co., 50	Oelricks v. Ford..... 84
Morris, Canal & Banking Co. v. Flaher, 538	Ofert v. Earlywine..... 356
Morris v. City of Reading..... 467	Ogden v. Ash..... 524
Morris v. Langley..... 404	Ogden v. Saunders..... 330, 616, 617, 618, 620
Morris v. Way..... 665	Ohio Life Ins. Co. v. Deboit..... 362
Morrison v. Davis..... 426	Okean v. Silverthorn..... 427
Morrison v. Lovejoy..... 181, 182	Ollivant v. Bayley..... 374
Morrison v. Mullin..... 364, 365, 366	Olmstead v. Camp..... 451
Moses v. Boston & Maine Railway..... 46	Oneida Manufacturing Co. v. Lawrence, 290
Mott v. Penn. R. R. Co..... 377	Orange Co. Bank v. Brown..... 658
Moulton v. Libbey..... 330	Orchard v. Hughes..... 490
M. R. & L. E. R. R. Co. v. Barber..... 634	O'Reer v. Strong..... 69
Mulr v. United Ins. Co..... 166	Orr v. Lacey..... 665
Mumford v. Gething..... 242	Osborn v. Hart..... 451
Munger v. Tonawanda R. R. Co..... 149, 658	Osborn v. Hawley..... 448, 449
Munson v. Hungerford..... 106	Osgood v. Brown..... 499
Mure v. Kane..... 573	Overall v. Wright..... 490
Murray v. Barlee..... 679, 681, 683	Overton v. Sawyer..... 623
Murray v. Lardner..... 267, 584	Overton v. Tracey..... 327
Murray v. McKee..... 438	Overton v. Tyler..... 448, 450
Muschamp's Case..... 96	Owens v. Dickinson..... 679
Myers v. Weinwrath..... 542	Owing v. Hull..... 628
Myers v. Walker..... 242	
Naff v. Crawford..... 26	Pacific R. R. Co. v. Governor..... 566, 572
Nass v. Van Swearingen..... 445	Page v. Trufant..... 445
Nantz v. McPherson..... 496	Pagore v. Wylie..... 414
Naugatuck R. R. Co. v. Waterbury But- ton Co..... 93, 94	Palge v. Smith..... 637
Needles v. Howard..... 656	Paine v. Parsons..... 505
Neely v. Planters' Bank..... 575	Painter v. Pittsburg..... 390, 392
Neff v. Horner..... 412	Palmer v. Andover..... 596
Negley v. Dinsday..... 447	Palmer v. Dodge..... 628
Nelson v. Casland..... 618	Pantam v. Isham..... 157
Nelson v. Dubois..... 438	Panton v. Holland..... 386
Nesbit v. Nesbit..... 150, 151, 153	Paradine v. Jane..... 84
New Albany & Salem R. R. Co. v. Tillair..... 361, 363	Pardee v. Drew..... 658
Newbold v. Wright..... 385	Parish v. Stone..... 623, 628, 665
New England Fire, etc., Ins. Co. v. De Wolf..... 277	Parker v. Browning..... 634, 635
New England Fire, etc., Ins. Co. v. Schettler..... 67	Parker v. Parmalee..... 239
New England Fire, etc., Ins. Co. v. Wet- more..... 39, 41	Parkhurst v. Foster..... 57
New Ipswich Factory v. Batchelder, 257, 258	Parsons v. Parsons..... 434
New Jersey v. Wilson..... 341	Pass. Bank v. Goss & Page..... 236, 237
New Jersey Steam Nav. Co. v. Mer- chants' Bank..... 83, 665, 659	Paton v. Colt..... 284
Newman v. Alvord..... 126	Patridge v. Menck..... 126
Newson v. R. R. Co..... 157	Petrie v. Ross..... 390
New York & Erie R. R. Co. v. Subin, 332, 354	Patterson v. Lytle..... 445
New York and Erie R. R. Co. v. Skinner, 658	Patterson v. Todd..... 396
Nicholas v. Chamberlain..... 257, 258	Pangeter v. Harris..... 150
Nicholson v. Hardwick..... 574	Paxton v. Popham..... 230, 568
Nicholson v. Leavitt..... 631	Peabody v. Ins. Co..... 436
Nicholson v. Patton..... 267	Pearson v. Skelton..... 370
Noe v. Gibson..... 634	Peck v. Jenness..... 310
Noke v. Awdler..... 150	Peltz v. Lalg..... 240
Norman v. Helst..... 434, 435, 451, 454	Pendleton v. Gray..... 484
Norris v. Androscoggin R. R..... 330	Pennington v. Gallard..... 387
Norris v. Beach..... 598	Pennington v. Gittings..... 559, 560, 623
Norris v. Clymer..... 377, 461, 467	Pennsylvania R. R. Co. v. Kelly..... 372
Norris v. Railroad Co..... 157	Pennsylvania R. R. v. Kerr..... 157
North Penn. R. R. Co. v. Helleman..... 208	Pennsylvania Salt Co. v. Neel..... 753
North Penn. R. R. Co. v. Mahoney, 149, 368	People v. Beasell..... 565
Northern Cent. Railway Co. v. Jackson, 348	People v. New York..... 547
Norton v. Eastman..... 548	People v. Palatine..... 451
Norton v. Woodruff..... 242	People v. Platt..... 343
Noyes v. Canfield..... 241	People v. Resolute Ins. Co..... 41
	People v. Romero..... 571
	People v. Salem..... 451
	People v. Tleman..... 55
	Perclval v. Blake..... 291
	Perkins v. Cummings..... 365, 696
	Perkins v. Eastern & B. & M. R. R. Cos 659
	Perkins v. Hart..... 664

TABLE OF CASES CITED.

21

PAGE.	PAGE.
Perkins v. Prout..... 203	Ragore v. Wylie..... 414
Perkins v. Washington Ins. Co..... 67	Railroad Co. v. Berks Co..... 264
Perley v. Eastern R. R. Co..... 157	Railroad Co. v. Gilheland..... 380
Perrina, Adm'r, v. Protec. Ins. Co..... 659	Railroad Co. v. Keary..... 641
Perrin v. Grange..... 382	Railroad Co. v. Skinner..... 361
Perry v. Billoau..... 470	Railroad Cos. v. Smith..... 330
Perry v. Truett..... 126, 144	Railroad Cos. v. Webb..... 624
Persch v. Dickson..... 241	Raley v. Greenleaf..... 484
Pelets v. Iron Mountain Railway Co..... 361	Ralph v. Brown..... 642
Petit v. Roseau..... 55	Ranch v. Lloyd..... 372
Pheland v. Moss..... 297	Randall v. Cochran..... 305
Phelps v. Decker..... 237	Randolph's Adm'r's v. Kinney..... 160
Philadelphia & Reading R. R. Co. v. Derby..... 556	Rankin v. Mortimere..... 431
Philadelphia & Reading R. R. Co. v. Spearin..... 149, 208	Raphael v. Bank of England..... 401
Philbrick v. Foster..... 232	Raphael v. Pickford..... 84
Phillips v. Briggs..... 370	Rapleby v. Bailey..... 509
Phillips v. Burns..... 476	Rapp v. Palmer..... 285
Phillips v. Chamberlaine..... 424	Ratcliff v. Mayor of Brooklyn..... 285
Phillips v. Probate Judge..... 499	Ratcliff v. Davis..... 499
Pierce v. Butler..... 395	Reeves v. Del. Lack. & W. R. R. Co..... 372
Pierce v. Franks..... 125	Reformed Church in Saugerties..... 282
Pierce v. Goldsberry..... 178	Remington v. Gettings..... 567
Pierce v. Hall..... 547	Repp v. Elliott..... 470
Piggett v. Eastern Counties Railway Co..... 157, 656	Rex v. Brecknock..... 571
Pidding v. Howe..... 126	Rex v. Curvan..... 574
Pillow v. Shannon..... 486	Rex v. Ford..... 574
Pinckard v. Pinckard..... 561	Rex v. Wharton..... 227
Piper v. Manny..... 525	Rex v. Thompson..... 574
Pittsburg v. Scott..... 377, 451, 454	Reynolds v. Douglass..... 508, 510, 511
Pittsburg Turnpike Co. v. The Commonwealth..... 361	Rhode v. Louthain..... 445
Pitte's Case..... 607, 608	Rhodes v. Otis..... 108, 109
Place v. Union Express Co..... 83	Rice v. Hosmer..... 327
Plank-road Co. v. Stephens..... 441	Rice v. Montpelier..... 290, 580
Ploughboy..... 496	Richard v. Lon. B'n, etc. Railway Co..... 651
Plummer v. Plummer..... 471	Richards v. M. S. & N. I. R. R. Co..... 46
Pocopeon Road..... 459	Richards v. Northwestern Prot. Dutch Church..... 377, 381
Poy v. Green..... 346	Richards v. Wescott..... 638
Prie v. Lord Summers..... 500	Richardson v. Stewart..... 628
Pollard v. Somerset Mut. Fire Ins. Co..... 39, 41	Richardson v. Vermont Cent. R. R. Co..... 380
Pollard v. Fire Ins. Co..... 41	Richmond, etc. R. R. Co. v. Louisiana It. R. Co..... 452
Pool v. Boston..... 317	Rigby v. Hewett..... 657
Pope v. Lynn..... 542	Riley v. Horne..... 657
Porter v. Chicago and Rock Island R. R. Co..... 94, 46	Ripley v. Aetna Fire Ins. Co..... 67
Potter v. Thornton..... 590	Rivers' Case..... 494
Powell v. Beddle..... 434	Roberts v. Tucker..... 650, 653
Powell v. Burnes..... 499	Roberts v. Cooper..... 580
Powell v. Knowles..... 590	Robinson v. Bayley..... 589
Powell v. Myers..... 45	Robinson v. Bland..... 696, 697
Powell v. Salisbury..... 637	Robinson v. Cone..... 148, 149
Power v. Ball..... 404	Robinson v. Green..... 628, 664, 665
Power v. Bergen..... 454, 462	Robinson v. Snyder..... 604
Powers v. Inness..... 277	Robison v. Reynolds..... 404
Pratt v. Atlantic & St. Lawrence R. R. Co..... 330	Roby v. West..... 685
Pratt v. Vattler..... 55, 57	Rockwood v. Wilson..... 365
Presbyterian Congregation v. Johnston..... 417	Rodemeyer v. Rodman..... 470
Price v. Maxwell..... 451	Rogers v. Brent..... 73
Price v. Methodist Church..... 377, 381	Rogers v. Conner..... 624
Price v. Monat..... 241	Rogers v. French..... 505
Price v. Taylor..... 451	Rogers v. Nowill..... 128
Pritchard v. Martin..... 478	Rogers v. Smith..... 462
Propeller Monticello v. Gilbert Mollison..... 206	Rogers v. Taintor..... 123
Proper v. Luce..... 398	Rohan v. Sawin..... 583
Prov. Bank v. Billings..... 380, 392, 398	Rose v. Bridgeport..... 296
Puckford v. Maxwell..... 282	Ross v. Bedell..... 296
Pupke v. Resolute Ins. Co..... 89	Roswell v. Prior..... 57
Puterbaugh v. Reasor..... 655	Roth v. Buffalo, etc. R. R. Co..... 46
Putnam v. Sullivan..... 414	Rowbotham v. Wilson..... 265, 287
Pyne, adm'r, v. The Great Northern Railway Co..... 307	Rowe v. Granite Bridge Corporation..... 98, 104
Quinn v. O'Gara..... 399	Rowell v. City of Lowell..... 579, 581
Quarman v. Burnett..... 634, 638	Ruck v. Williams..... 637
	Rucker v. Abel..... 561, 562
	Ruiz v. Morton..... 432
	Rush v. Williams..... 611
	Russell v. Fuller..... 676
	Ruth v. Kutz..... 256
	Rutland v. Paige..... 442
	Ryan v. New York Cent. R. R. Co..... 57
	Rydket v. Monahan..... 364

TABLE OF CASES CITED.

PAGE.	PAGE
Sackett v. Andross.....	618
Salman v. Wallair.....	642
Rampson v. Thompson.....	438
Samuel v. Payne.....	573
Sanborn v. Chittenden.....	442
Sanford v. Norton.....	267
Sanford v. Chase.....	598
Sanford v. Hayward.....	442
Sands v. Tillinghast.....	361
Sargent v. Adams.....	241
Saunders v. Frost.....	239
Saurman v. Bodey.....	395
Savage v. Bangor.....	580
Sayles v. Tibbitts.....	599
Schaffer v. Farmers and Mechanics Bank.....	438, 439
Schenley v. City of Allegheny.....	343
Schenley v. The Commonwealth.....	361
Schleffelin v. Stewart.....	122
Schoenberger v. Mulhollan.....	451
School Trustees of Trenton v. Bennett.....	84
Schooner Mirandi v. Dowling.....	646
Schuykill Bridge v. Fralley.....	354
Scott v. Gilmore.....	666, 667
Scott v. Mayor.....	634
Scott v. Pebbles.....	380, 514
Scott v. Shepherd.....	57, 637
Scott v. Wiles.....	230
Seaton v. Second Municipality.....	180
Seaver v. Robinson.....	508
Seddon v. Connell.....	309
Sedgwick v. Staunton.....	580
Segourney v. Mann.....	484
Sergeant v. Kuhn.....	461, 467
Severence v. Hilton.....	300
Sextas v. Woods.....	296
Seybert v. City of Vicksburg.....	534
Shackell v. Foster.....	261, 263
Shaffer v. McKee.....	650, 662
Shannon v. Comstock.....	478
Shannon v. Shannon.....	254
Sharpless v. Mayor.....	377
Shattuck v. Freeman.....	631
Shaw v. Crawford.....	108
Shaw v. Norfolk County R. R. Co.....	548
Shaw v. Trustier.....	250
Shay v. People.....	442
Shelboyan Co. v. Parker.....	584
Sheets v. Baldwin.....	646
Sheldon v. Hartford Fire Ins. Co.....	67
Shelton v. Marshall.....	430
Shenk v. Robeson.....	438
Shepard v. De Bernales.....	218
Shepard v. Chelsea.....	579
Shepherd v. Hamp.....	482
Shinkle v. Crook.....	434
Shipman v. Burrows.....	360
Shirley v. Fearnie.....	471
Shock v. Miller.....	670
Shrunk v. Nav. Co.....	330
Sibley v. McAllister.....	673
Sickles v. Patterson.....	664
Siegel v. Robinson.....	423
Silsbury v. McCoon.....	198
Simmons v. Richardson.....	486
Simpson v. Breckenridge.....	423
Simpson v. Clark.....	404
Simpson v. Stackhouse.....	412
Stclair v. Healy.....	442
Singleton v. Bolton.....	126, 144
Singleton v. Lewis.....	547
Skillen v. Merrill.....	670
Slater v. Rawson.....	150, 151
Slater v. Rulk.....	73
Sleat v. Fagg.....	657
Smart v. Morton.....	385
Smedley v. Erwin.....	451
Smeed v. Ford.....	657
Smelters & Harris v. Rainey and others.....	646, 647
Smith's Adm'r v. Pollard.....	287
Smith v. Allen.....	470
Smith v. Barston.....	261
Smith v. Boston & Maine R. R. Co.....	651
Smith v. Brazelton.....	36
Smith v. Columbia Ins. Co.....	299
Smith v. Kenrick.....	385
Smith v. London & S. R. R. Co.....	60, 157
Smith v. Mechanics' Bank.....	267, 650
Smith v. O'Connor.....	149
Smith v. Saratoga M. F. Ins. Co.....	273, 437
Smith v. Smith.....	185, 243
Smith v. Stewart.....	358
Smith v. Webster.....	427, 438
Smith v. Wendell.....	579
Smith v. Wilson.....	243
Smythe v. Banks.....	536
Snevily v. Egle.....	423, 432
Snow v. Adams.....	573, 580
Snyder v. Riley.....	404
Soles v. Hickman.....	427
Southard v. Central R. R. Co.....	454
Southcote v. Stanley.....	656
Southwark R. R. v. Philadelphia.....	530
Southworth Bank v. Gross.....	412
Sparhawk v. Salem.....	573, 551
Spaulling v. Oakes.....	261
Speer v. Whitfield.....	442
Spencer's Case.....	150, 151
Spencer v. Halstead.....	479
Spencer v. Pierce.....	547
Spencer v. Utica R. R. Co.....	148
Sprague v. Blake.....	280
Sprague v. Smith.....	640
Spriggs v. Camp.....	156
Springfield v. Harris.....	528
Springstein v. Field.....	390
Sproule v. Lawrence.....	442
Staats v. Smith.....	242
Staines v. Shore.....	430
Stanley v. Jones.....	559, 564
Stanley v. Nelson.....	665
State v. Findley.....	573
State v. Governor.....	566, 573
State v. Maffitt.....	572
State Mutual Fire Ins. Co. v. Roberts.....	30
State v. Noyes.....	361
State of Ohio v. Chase.....	566
State v. Peck.....	442
Stebbing v. Walkley.....	494
Steele v. Steele.....	327
Steinway v. Erie Railway.....	157, 426
Stephens v. Graham.....	412
Sterrett v. Creed.....	628
Stevens & Dwight v. Phoenix Ins. Co.....	642
Stevens v. Oswego, etc., R. R. Co.....	149
Stewart v. English.....	414
Stewart v. Smith.....	242
Still v. Hall.....	290
Stizell v. Reynolds.....	356
Stockdale v. Bushly.....	434
Stoeve v. Weir.....	443
Stoeve v. Whitman.....	385
Stokes v. Landgraf.....	125, 126, 143
Stone v. Cartwright.....	654
Stone v. Hooker.....	361, 370
Stonehewer v. Fana.....	552
Storrs v. Utica.....	390
Story v. N. Y. & Harlem R. R. Co.....	180, 181
Story v. Odlin.....	257
Stout v. Wood.....	364
Stout v. Wren.....	232
Stow v. Conwise.....	390
Strong v. Lord Winsor.....	485
Strong v. Strong.....	530, 354
Struthers v. Kendall.....	412
Stuart v. Clark.....	109
Stuber's Road.....	457
Stubley v. London & N. W. R. W. Co.....	211

TABLE OF CASES CITED.

23

PAGE.	PAGE.
Stultz v. Dickey.....	385
Sturges v. Burton.....	646
Sturges v. Langworthy.....	646
Sturges v. Crowninshield.....	616, 617, 618
Sury v. Pigot.....	228
Susquehanna Bridge & Bank Co. v. Evans.....	308
Susquehanna Canal v. Wright.....	380
Sutor v. Reformed Dutch Church.....	417
Swadlow v. Moore.....	361
Swazy v. Brooks.....	257, 258
Swift v. Tyson.....	404, 405
Sykes v. Sykes.....	128
Taylor v. Eckhart.....	56
Taggart v. McGinn.....	391
Talbott v. Bank of Rochester.....	658
Talmage v. Rens. & Sar. R. R. Co.....	361
Tancred v. Allgood.....	656
Tate v. Citizens' Mut. Fire Ins. Co.....	97
Tate v. Hibbert.....	559, 623
Taylor v. Merchants' Ins. Co.....	320
Taylor v. Carpenter.....	126
Taylor v. Fitch.....	646
Taylor v. Kneeland.....	400
Taylor v. Meekly.....	442
Taylor v. Merchants' Fire Ins. Co.....	67, 277
Taylor v. Porter.....	459
Teal v. Sears.....	98
Teer v. Mooror.....	499
Telfer, Adm'r. v. The Northern R.R. Co.....	207
Ten Eyck v. Vanderpoel.....	508
Tennant v. Elliott.....	598
Terrett v. Taylor.....	381
Thayer v. Middlesex Fire Ins. Co.....	87
Thomas v. Fallwell.....	676
Thomas v. Williams.....	666
Thomas v. Winchester.....	656
Thompson v. Brown.....	679
Thompson v. Dorsey.....	550
Thompson v. Ide.....	589
Thompson v. Lee Co.....	584
Thoms v. Vonkapf.....	298
Thomson v. Winchester.....	126, 139, 144
Thorington v. Smith.....	242
Troughgood's Case.....	443
Thorne v. Rut. & Burl. R. R. Co.....	380, 381
Thrasher v. Ely.....	508, 509
Thurston v. Percival.....	589, 590
Tillou v. Kingston Mut. Ins. Co.....	39, 40
Timmons v. Central Ohio R. R. Co.....	659
Todd v. Lee.....	685
Todd v. Hough.....	400
Toledo, Wabash, etc., R. R. Co. v. Goddard, etc., R. R.....	206, 215
Toledo, Wabash, etc., R. R. Co. v. Harmon.....	57
Toler v. Armstrong.....	281
Tomlinson v. Monmouth Ins. Co.....	273
Torrey v. Baxter.....	283
Tower v. Prov. & Worcester R. R. Co.....	658
Tower v. Utica & Schenectady R. R. Co.....	658
Town of Lewiston v. Proctor.....	98
Town v. Stetson.....	126
Town v. Mead.....	646
Townson v. Havre de Grace Bank.....	655
Traders' Ins. Co. v. Robert.....	36, 40
Train v. Jones.....	508
Trask v. Hartford & N. H. R. R. Co.....	57
Trent v. Lord.....	108
Trelawny v. Williams.....	500
Trovinger v. McBurney.....	665
Trow v. Vermont Cent. R. R. Co.....	659
Trustees of Hopkins Academy v. Dickinson.....	227
Tubbs v. Richardson.....	271
Tucker v. Seamen's Aid Society.....	434
Tullet v. Armstrong.....	681, 683
Tulley v. Portsmouth.....	590
Turner v. Reynolds.....	385
Turnerville v. Stampe.....	157
Turpin v. Thompson.....	623
Turvey v. Midland Railway Co.....	59
Tyler v. Wilkinson.....	237
Ullingate v. King.....	445
Underhill v. Van Courtlandt.....	499
Union Bank v. Coester's Ex'rs.....	428
United States v. Appleton.....	257
United States v. Guthrie.....	556
United States Tel. Co. v. Wenger.....	428
Upham & Clay v. Wheelock.....	294
Usher v. Noble.....	168, 185
Utley v. Merrick.....	444
Van Aukin v. Westfall.....	356, 514
Vanbibber & Co. v. Bank of Louisiana.....	650
Vanderburg v. Truax.....	657
Van Hoffman v. City of Quincy.....	236
Van Horn v. Kermit.....	46
Vanhorn v. Scott.....	394
Van Hostrup v. Madison City.....	534
Van Ness v. Hamilton.....	399
Van Ness v. Pucard.....	335
Van Rensselaer v. Date.....	398
Van Santvoord v. St. John.....	98
Van Wirt v. Wilkins.....	511
Varick v. Smith.....	451, 454
Vaughan v. Menlove.....	157, 656
Vaughan v. Taff. Val. R'way Co.....	157, 656
Veazie v. Dwinel.....	108, 109
Vermont Central R. R. Co. v. Estate of Hills.....	257, 258
Vernon v. Smith.....	298
Vertner and wife v. McMurrin.....	499
Vesey v. Beams.....	144
Vick v. Percy.....	477
Vinal v. Dorchester.....	579
Vorhees v. Presbyterian Church of Amsterdam.....	332
Voyle v. Hughes.....	590
Vrooman v. Phelps.....	239
Wade v. Whittington.....	414
Wadsworth v. Smith.....	98, 106, 109
Wallis v. Cooper.....	498
Wait v. Wait.....	27
Waite v. N. E. Railway Co.....	149
Wakefield v. Martin.....	277
Wakely v. Hart.....	574
Waldron v. Rens. & Saratoga R. R. Co.....	361
Walker v. Jackson.....	657
Walker v. Moore.....	422
Wall v. Wall.....	471
Wallize v. Wallize.....	434
Walmsley v. Read.....	434
Walpole v. Bridges.....	426
Walrath v. Thompson.....	242
Walsh v. Washington Ins. Co.....	319
Ward v. Collyhan.....	197
Ward v. Henry.....	167
Ward v. Smith.....	295, 494
Ward v. Turner.....	559, 623
Waring v. Edmonds.....	623
Warrington v. Furber.....	511
Wash. Bridge Co. v. State.....	331
Waterman v. Isaac Merritt & Co.....	598
Waters v. Merchants' Louisville Ins. Co.....	659
Watts v. Cummins.....	428
Weakly v. Hall.....	598
Weaver v. Ward.....	657
Webb v. Russell.....	150
Webster v. Paul.....	84
Weed v. Schenectady & Saratoga R. R. Co.....	93
Welch v. Dirken.....	642
Welch v. Sackett.....	159
Welch v. Stowell.....	243

PAGE.	PAGE.
Welch v. Whitmore.....	631
Wells v. Middletown.....	565
Welsh v. Pittsburg and Fort Wayne R. R. Co.	84, 93
Westworth v. First Parish in Canton..	382
West Branch In. Co. v. Helfenstein, 320,	321
Westchester School District v. Dar- lington.....	347, 351
West River Bridge Co. v. Dix.....	451, 452
Westerlo v. De Witt.....	623
Western Ins. Co. v. Riker.....	278
Western Trans. Co. v. Newhall.. 84, 93,	95
Wheatley v. Baugh.....	385
Wheaton v. Baker.....	431
Wheeler v. Russell.....	665
Whetstone v. Colley.....	122, 125
Whirley v. Whittemore.....	149
Whitaker v. Brown.....	385
White v. Brown.....	299
White v. Langdon.....	284
White v. Tudor.....	245
White v. Vermont and Mass. R. R. Co.,	583
	584
Whitehead v. Anderson.....	200
Whiting v. Grout.....	508
Whiting v. Johnson.....	442
Whiting v. Sheboygan.....	451
Whitney v. Allaire.....	445
Whitney v. Olney.....	257
Whitsett v. Northampton Co.....	349
Whittaker v. Edmonds.....	404
Whitton v. Peacock.....	150
Whitton v. Russell.....	434
Wilber v. Duke of Portland.....	594
Wilcox's Adm'r v. Rome, etc., R. R. Co.	210
Wilcox v. Howard.....	543
Wilcox v. Parmelee.....	93
Wilcox v. Wilcox.....	502
Wilde v. Savage.....	512
Willey & Co. v. Gray.....	470
Willie v. Bolster.....	657
Wilkins v. Phillips.....	640
Wilkinson v. Leland.....	454
Willan v. Willan.....	434
Williams v. Bagley.....	447
Williams v. Johnson.....	125
Williams v. Mich. Cent. R. R. Co.....	659
Williams v. State.....	490
Williams v. Woods.....	242
Williamson v. Henly.....	26
Wills v. Staten.....	509
Wilson v. Butt.....	657
Wilson v. Conway.....	67
Wilson v. Genesee Mut. Ins. Co.....	67
Wilson v. Hamilton.....	474, 657
Wilson v. Hill.....	277, 278
Wilson v. Martin.....	479
Wilson v. Newport Dock Co.....	637
Wilson v. Widenham.....	160
Winebreuner v. Colder.....	417, 418
Windt v. German Reformed Church.....	380
Winstead v. Davis.....	476, 477
Winterbottom v. Wright.....	666
Wintermute v. Clarke.....	525
Wintermute v. Montgomery.....	648
Wiseman v. Beake.....	430
Witherspoon v. Currie.....	142
Walcott v. Robbins.....	594
Wolf v. Caruthers.....	442
Wolf v. Goulard.....	126
Wolf v. Myers.....	84
Wood v. Crocker.....	46
Wood v. Gibbs.....	508
Wood v. Rutland & Addison Mut. Fire Ins. Co.	278
Woodbury v. Short.....	257
Woodruff v. Hinman.....	665, 666
Wooley v. Battle.....	261, 262
Worcester Bank v. Dorchester Bank.....	297
	404, 406
Work v. Harper.....	471
Worrall v. Gheen.....	414, 415
Worty v. Battle.....	368, 371
Wren v. Pearce.....	508
Wright's Appeal.....	327
Wright v. Gear.....	695
Wright v. Malden, etc., R. R. Co.....	149
Wright v. Paige.....	399
Wyld v. Pickford.....	657
Yale v. Dederer.....	676
Yates v. Whyte.....	304, 306
Yeates v. Reed.....	198
York Co. v. Ill. Cent. R. R. Co.....	93
Young v. Dearborn.....	268, 269
Young v. Eagle Fire Ins. Co.....	39
Young v. Glendening.....	561
Young v. Grote.....	414
Youngs v. Lee.....	404
Zacharias v. Zacharias.....	394
Ziegenfuss' Case.....	676

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

TEDDER, appellant, v. ODOM *et al.*

(2 Helsk. 68.)

Promissory note — sale for illegal purpose

B. bought a horse of A. for the Confederate cavalry service, and gave a promissory note for the purchase-money. *Held*, that bare knowledge on the part of A. that B. intended to make an illegal use of the horse did not vitiate the note.

THIS is a bill to enjoin the collection of a judgment, rendered on the 16th of September, 1862, by a justice of the peace, for Cannon county, on a note for \$150. Complainant, being about to enter the cavalry service of the Confederate States, purchased of one of the defendants, a horse, to be used in that service. The proof is abundant that the horse was purchased for that purpose, and that complainant was fully cognizant of the object of the defendant in making the purchase. Complainant required the defendant to give his note, with two sureties, for \$150, which was the full value of the horse.

This note was sued on before a justice of the peace, when the payor and his sureties suffered judgment to be rendered without making any defense. Execution issued and was levied on the land of one of the defendants, and upon its being condemned for sale

this bill was filed, making substantially the allegations recited, and an injunction was granted to stop the sale. The defendants submit to the jurisdiction and answer the several allegations of the bill with a good deal of evasion, such as denying positively that a horse was sold to be used in the Confederate service, but admitting a mare was sold; but insisting that she was not fit for the cavalry service; and denying that the consideration of the note was illegal.

J. L. Fare and *M. W. McKnight* for complainant.

James S. Barton for defendants.

NICHOLSON, C. J. (after stating the facts). The proof, as already stated, fully establishes the fact that complainant bought the mare for the purpose of using her in the Confederate cavalry service, and that she was so used, and that the defendant knew the purpose for which she was bought. But the proof fails to show that the defendant's object in selling was to promote the Confederate cause. He sold for a full price, exacted two sureties to the note, and most probably was looking only to his own interest, and not to that of the confederacy, in making the sale.

That such a contract was not illegal on the part of the defendant, was decided by this court at its recent term, in the case of *Naff v. Crawford*, 1 Heiskell, 116. The rule laid down in that case is, "that the *agreement* must be to do, or to further, some illegal or immoral purpose in violation of public policy. The element that destroys the validity of the agreement is the purpose by the agreement to effect or aid the forbidden end, or else the consideration for the promise must have been to do and perform an illegal or immoral act." The proof discloses no such element in the contract on the part of the defendant. He did not agree to sell the horse in consideration that complainant would use him in the Confederate service, but in consideration that complainant would give to him his note for \$150 with two securities. The rule which governs the case is aptly illustrated by Mr. Story in his work on Contracts, vol 1, § 541, in which he says: "So, also, a lease of lodgings for the purpose of prostitution is void. But the mere fact that the person to whom the board or lodging or any articles are furnished, is a prostitute, does not invalidate the contract therefor, unless the *very object* of the agreement be to pander to her prostitution." As

Allen v. McCullough.

we do not think the proof shows the object of the defendant to have been to aid the rebellion, but simply to convert his mare into a good note for his private purpose, we hold that the bare knowledge, on the part of the defendant, that complainant intended to make an illegal use of the horse does not vitiate the note.

The decree below is affirmed, with costs.

Decree affirmed.

ALLEN *et al.* v. McCULLOUGH *et al.*, appellants.

(3 Helak. 174.)

Husband and wife — effect of divorce on husband's liabilities for wife's debt.

C. married M., a female guardian, who continued to exercise her guardianship after the marriage. Subsequently she obtained a divorce *a vinculo*. Held, that he was not relieved by the divorce from liability for her debts under the guardianship contracted before and during coverture.

BILL in chancery, for the purpose of having the right of the complainants, in certain devised property, declared, and of compelling an account as to the guardianship of one of the defendants. The complainants are Nathan J. C. and Robert F. Allen and Martha Ann Harris, children of defendant, Susan F. McCullough, by two former husbands. Susan's last husband died in 1849, and in 1852 she qualified as guardian of the three children. In 1855 she married James McCullough, who is co-defendant in this suit. This bill was filed against defendants, in April, 1860, charging them with liabilities on the guardianship of over \$8,000. In December of the same year (1860) a separation occurred between Susan and James, and in September, 1865, Susan obtained a decree of divorce *a vinculo* on the ground of the adultery of her husband James. The final decree in chancery was not entered until December, 1866; and defendant McCullough insists that he was discharged by the divorce.

Stokes & Son, for complainants, cited 2 Scribner on Dower, 508, 509, McQueen on Husb. & Wife, 211; Bac. Abr. Baron & Feme, F.; *Jones v. Walkup*, 5 Sneed, 135; *Wait v. Wait*, 4 N. Y. 100, 101, 109; Code, 2471, 2472, 2473; *Ames v. Norman*, 4 Sneed, 683; *Forrest*

Allen v. McCullough.

v. *Forrest*, 6 Duer, 102; *Burr v. Burr*, 10 Paige, 25, 26; *Mansfield v. McIntyre*, 10 Ohio, 28 (O. S.); *Gillespie v. Worford*, 2 Cold. 632; Bishop on Marr. & Div., § 705. He is clearly liable for what came to his hands. 1 Hill, 410; 3 Monr. 354; 7 id. 329; 2 J. J. Marsh. 190; 4 id. 215.

Williamson & Martin, for defendant, cited 2 Lomax on Ex'rs, 501, 502; 2 Bright on Husb. & Wife, 22, 33; *Chenault v. Chenault*, 5 Sneed, 250; 1 Story's Eq. Jur., § 582; *Adair v. Shaw*, 1 Sch. & Lef. 273; 2 Bright on Husb. & Wife, 22, 36.

J. J. Turner, with them, cited 2 Williams on Ex'rs, 1562, *m*; 2 Lomax on Ex'rs (2d ed.), 305, 501, *m*; 1 Roper, 187; 2 Bright on Husb. & Wife, 22, 25, 27, 30; Reeve's Dom. Rel. 1; Clancy on Husb. & Wife, 13, 14, 18; 5 J. J. Marsh. 214; 9 B. Monr. 412; 13 Ves. 517; 3 B. Monr. 354; 2 Dana, 238; 28 Law Lib.—; 1 Sch. & Lef. 262, 265; 1 P. Wms. 466; 3 id. 409; Cord on Married Women, 880, 881, 882; Bishop on Marr. & Div. 660, 668; 17 Mo. 87; 10 Paige, 420, 421; 8 Mass. 99; 20 Mo. 363.

NELSON, J. (after stating the facts). It is a familiar principle, that the husband, by marriage, acquires an absolute title to all the personal property of the wife, not being her separate estate created by deed, will or other lawful mode of creating such estate, which she had in possession, or in action, at the time of the marriage, and which he reduces into his possession during the marriage; and after her death, he may, if he survives her, become her administrator, and recover her choses in action, or other personal property not reduced into possession during the coverture. See Reeve's Dom. Rel. 1; Ch. Pl. 31; Browne on Actions, 43 Law. Lib. 237, *m*.

As a consequence of this principle, the husband becomes liable to the creditors of his wife for all debts due or owing by her at the time of the marriage, and this whether he acquires any property in fact by the marriage or not; but it is generally said that this liability continues no longer than the coverture, and is wholly independent of any question growing out of the amount of property received or not received in virtue of his marital rights. Reeve's Dom. Rel. (3d ed.) 53, 54; *Adair v. Shaw*, 1 Sch. & Lef. 263; *Jones v. Walkup*, 5 Sneed, 138, 139; Browne on Actions, 43 Law. Lib. 245, *m*.

Founding their argument upon the principle last stated, it is strenuously maintained by the counsel of James McCullough, that

Allen v. McCullough.

the divorce obtained by his wife operated as a civil death; that no decree finally and definitely ascertaining the amount of his liability for the acts of the wife before and during the marriage, was pronounced anterior to the divorce; that the effect of the appeal in this case was to vacate and annul all the decrees pronounced in the chancery court, and that this court has no more power to pronounce a decree against the husband, for the wife's liability, than it would have possessed in the event of her natural death. In aid of this position several authorities have been cited; but the doctrine to be deduced from them is summarily and correctly stated in Shelford on Marr. & Div., 31 Law Lib. 639, *m*, as follows: "The husband is liable to the debts of the wife contracted by her before the coverture, and the husband and wife may be jointly sued for such debts during coverture. But if these debts are not recovered against the husband and wife in her life-time, the husband cannot be charged for them, either at law or in equity, after the death of the wife. The husband, during the coverture, is liable for all his wife's debts, though he had nothing with her; and, on the other hand, though he had a considerable personal estate with her, yet, unless he be sued during the coverture, he is not afterward liable, even in equity. But, if the wife survive the husband, an action may be maintained against her for the recovery of such debts."

While such is the general doctrine as to rights which may be affected by the natural death of the wife, but little aid can be derived from the English authorities as to the effect to be given here to a divorce from the bonds of matrimony. There it would seem that the power to grant a divorce *a vinculo* rested only in parliament, as it was exercised by our State legislature prior to the constitution of 1834. The divorce *a vinculo matrimonii* was unknown to the ecclesiastical courts, which had only the power to declare the nullity of the marriage for causes existing at the time when the marriage took place; and could not, even for adultery, grant any other than a divorce or separation *a mensa et thoro*. See Shelf. on Marr. & Div., 31 Law Lib. 364, 365, *marg*. But, by the constitution of 1834, article 11, section 4, the legislature was prohibited from granting divorces, but empowered to authorize the courts of justice, by general and uniform laws, to grant them for such cause as might be specified by law. This was followed by the act of 1835, chapter 26, and by other statutes passed subsequently, and carried into the Code, §§ 2448, 2478. Without here transcribing section 2448, which speci-

fies nine causes of divorce from the bonds of matrimony, it will be seen that three of them, at least, are causes existing at the date of the marriage, and which would avoid the contract for fraud; while the remaining six causes are such as arise after the marriage is celebrated. From the very nature of the causes, the effect of the decree dissolving the bonds of matrimony might be different in the two classes of cases — declaring, in the one, that the marriage never had a legal existence; and, in the other, that, although lawful in its origin, the contract is abrogated for causes subsequently occurring. In the one, it might be properly declared that no rights of property were acquired by either party; in the other, that rights which had been acquired and acted upon would not be disturbed.

When the divorce is granted for causes which arose during the marriage, it does not follow that the same legal consequences would result as in case of the death of either party; for, although the bonds of matrimony are dissolved, and either party is at liberty to marry again, there are rights of property connected with or growing out of the marriage relation, which, under the provisions of the Code, continue after the dissolution of the marriage, and are dependent upon which of the marriage parties may be the successful actor in procuring the divorce. Under section 2471, and the four previous sections, if the wife be the successful party, the most liberal provisions may be made by the court pronouncing the decree for alimony and the support of the wife, by vesting in her the title to part of the husband's property; but it is expressly declared that "if the wife, at the time of a decree dissolving the marriage, be the owner of any lands, or have in her possession, goods or chattels, or choses in action, acquired by her own industry, or given to her by devise or otherwise, or which may have come to her, or to which she may be entitled by the decease of any relative intestate, she shall have entire and exclusive dominion and control thereof, and may sue for and recover the same in her own name, subject, however, to the rights of creditors who became such before the decree was pronounced." And, on the other hand, it is provided by section 2472, that "when a marriage is dissolved at the suit of the husband, and the defendant is owner, in her own right, of lands, his right to and interest therein, and to the rents and profits of the same, shall not be taken away or impaired by the dissolution, but the same shall remain to him as though the marriage had continued; and he shall also be entitled to her personal estate in possession or in action. and

Allen v. McCullough.

may sue for and recover the same in his own name." Other important provisions are contained in sections 2473 to 2477, relating to the person by whom and the causes for which the divorce may be obtained, and the rights of property, etc., but the sections quoted clearly show that, by the laws of this State, the consequences of a divorce *a vinculo* are not the same as those resulting from the death of either party.

In the event of the wife's death, the husband can only become owner of her personal property and choses in action not reduced into possession during the coverture by administering on her estate; and is then only liable to the wife's creditors before marriage to the extent of the value of property administered upon, and this without any reference to the quantity or value of the property reduced into his possession during the marriage. But the necessary implication resulting from, and the proper construction of the language employed in section 2471 — "*subject, however, to the rights of creditors who became such before the decree was pronounced*" — is, that the creditors of the husband, or of the husband and wife, who maintained that relation at any time during the marriage, are not to be precluded from collecting their debts out of the husband, or out of the wife's property to which his marital rights had attached, by reason of the divorce *a vinculo*. Nor was it the intention to preclude the creditors of the wife, who were such before the marriage, from collecting their debts out of her property secured to her by section 2471. The character of the property specified justifies the interpretations which includes the creditors of both or either. If, at the time of the divorce, she was the owner of any lands, the husband, notwithstanding the divorce, would be tenant by the courtesy or during the life of the wife, according to circumstances. If she has in her possession goods, or chattels, or choses in action, acquired by her own industry, the husband would be entitled to these by virtue of his marital right; and as credit may have been extended to the wife on the faith of the wife's ownership, before the marriage, or to the husband on the faith of his ownership, afterward, the intention was to save the rights of the creditors of either, and to hold the property liable to the satisfaction of their demands. And it is implied in this section, that, although a decree dissolving a marriage may be pronounced, the husband's marital right to reduce into his possession any personal property given to or inherited by her, having attached during the marriage, would continue after

its dissolution; and therefore, if there are no creditors, his right to do so is restricted and destroyed by the saving in favor of the wife (creditors out of the way), to sue for and recover the same in her own name, and to have entire and exclusive dominion and control thereof.

The provision in section 2473, that "if the bonds of matrimony be dissolved at the suit of the husband, the defendant shall not be entitled to dower in the complainant's real estate, nor to any part of his personal estate, in case of his intestacy, nor to alimony," when taken in connection with the provision in section 2398, that "if any person die intestate, leaving a widow, she shall be entitled to dower in one-third part of the lands of which her husband died seized and possessed, or of which he was equitable owner," clearly conveys the idea that, in the view of the legislature, a divorced wife might be regarded as a widow, and would be entitled to dower and distribution; and the obvious intention was to punish her as the faulty or guilty party, by excluding her from asserting such claims where the marriage is dissolved at the husband's instance.

In the case of *Ames v. Norman*, 4 Sneed, 683, where a conveyance was made in fee, during the marriage, to husband and wife jointly, and the land was sold at the instance of an execution creditor of the husband, and a bill was filed by the wife for divorce, this court held that the unity of seizin in respect to the joint estate was severed and destroyed by the divorce; that the parties held by moieties; that the purchaser "became invested with the right of the husband as it existed at the time of the sale, that is, a right to occupy and to enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that if the complainant survived her former husband, his estate would then terminate; but if the husband survived, he would become absolute owner of the whole estate." In that case, it was observed by McKINNEY, J., that "the decree in this case would seem to take it for granted that, upon a dissolution of the marriage by a divorce at the suit of the wife, the same legal consequences follow, in all respects, as if the marriage had been dissolved by the death of the husband. This is a very erroneous assumption, so far, at least, as relates to the question under consideration." *Id.* 694. And, in the case of *Gillespie v. Worford*, 2 Cold. 632, it was held, that where the husband had conveyed the wife's land in fee, for himself, and as attorney in fact for the wife, although the power of attorney

Allen v. McCullough.

executed by the wife was void and inoperative to convey her interest in the land, yet the deed, notwithstanding a subsequent divorce at the wife's instance, was operative to pass the husband's title as tenant by the courtesy, and "vested the purchasers with an estate of freehold in the one-third undivided interest in the lands therein described, determinable on the death of the tenant by the courtesy." *Id.* 644.

We hold, therefore, that the same legal consequences did not result from the divorce obtained by the wife in the case before us, that would have resulted from her natural death.

(Judge NELSON here discusses a matter of chancery practice, and then proceeds). We do not determine that McCullough, in consequence of his marriage, actually became guardian in place of his wife, who, as is admitted in the pleadings, was appointed guardian at the January term, 1852, by the county court of Wilson county. In England, it has been held that where a female marries, who has been appointed guardian by the court, it is, of course, to make a reference to appoint a guardian, even if she be the mother of the infant; but she may be re-appointed. 3 *Lead. Cas. in Eq.* (3d ed.) 234. Although the Code, sections 2489 to 2546, contains the results of very careful legislation as to the duties and rights of guardian and ward, and, without abridging the powers of the chancery court, confers a very extensive and important jurisdiction upon the county court, as to the appointment and removal of guardians and the settlements to be made with them, it does not contain any provision whatever as to the legal consequences resulting from the marriage of a female guardian. But as the county court, by Code, section 2493, is invested with "full power to take cognizance of all matters concerning minors and their estates," and may appoint a guardian wherever it appears necessary, it may be presumed that if a female guardian marries a person who, in the judgment of the court, is not a proper person to act in that character, it would be competent for the court to treat the marriage as a renunciation of the guardianship, and to appoint a new guardian in her place. This point is not now adjudicated, and is noticed, incidentally, for the purpose of declaring, as we do in this case, that if a man marries a woman who is guardian at the time, he assumes, by the marriage, her contract of guardianship, just as, by the marriage, he becomes liable, in any other case, for the contracts of the wife; and if, as was the case here, the wife, with his knowledge, continues to act in her fiduciary capacity, and to

make settlements as guardian with the county court, or continues to act as guardian, and fails to make the annual settlements required by law, he becomes just as much bound for her acts as if his own name were affixed to her bond as guardian. It is a well-established principle of equity jurisprudence that "trusts are enforced not only against those persons who are rightfully possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whosoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust." See *Adair v. Shaw*, 1 Sch. & Lef. 262; Peck, 443; 5 Sneed, 465.

Neither the death of the wife, nor a divorce, can exonerate the husband from her liability as guardian, both before and during her coverture. It is presumed that she has carried, or ought to carry, the annual accretions of the ward's estate into each successive year; that she holds, or is bound to hold, the accumulated and accumulating funds in her hands at the commencement of each year, and that these are on hand, or subject to her control, if she still acts as guardian, at the time of the marriage, and that, if she continues to act after the marriage, it is with her husband's assent, and is, in law, his act; and although he is not technically a guardian, he becomes such practically and by operation of law, so far as the estate of the ward is concerned, through the legal identity of husband and wife, and is to be regarded in equity as contracting jointly with her for its faithful management and their joint accountability. If he does not wish to maintain this attitude, and the legal control over the wife with which he is invested by law is inadequate to enable him to escape future liability, it would not be difficult for him to obtain relief from the county or chancery courts. He is presumed to know his own rights, and to be capable of asserting and maintaining them. The minors are presumed not to know, and to be incapable of enforcing their legal interests; and it would be inequitable to permit their estate to be squandered, and to allow the husband, whose criminal misconduct occasioned the divorce, to take advantage of his own wrong, and shelter himself behind the technical defense, that the dissolution of the marriage protects him against acts which were just as much his own as the acts of his wife, in legal contemplation.

Wright v. Winningham.

(Judge NELSON disposes of another matter of practice and closes.) With the modifications of the account directed in the memorandum appended hereto, the decrees of the chancellor are, in all other respects, affirmed.

WRIGHT, plaintiff in error, v. WINNINGHAM.

(3 Holak. 264.)

Rebellion — citizen assisting soldiers, liability of.

A citizen, assisting Confederate soldiers in the capture of a Federal soldier, does not thereby render himself liable to a civil action by the captive.

ACTION on the case. On the trial of this action for trespass, assault and battery and false imprisonment, it was in proof that the defendant in error was a soldier in the United States army, absent on leave; that George Threat and others, who were soldiers in the rebel army, and under the command of Colonel F. H. Dougherty, a regular officer in the rebel service, were permitted by him to go into the neighborhood where defendant in error was; that Threat and his associates were expressly ordered by their commanding officer to arrest and bring into camp any Federal soldier whom they could find; that, in obedience to this order, they started "on a scout;" and learning that defendant in error was at home, surrounded his house about daylight, and captured him; and that he was guarded and taken, by way of Livingston, to Chattanooga, where, it may be inferred, he was detained as a prisoner, some time in the year 1862, but the precise date of the arrest, and nature and duration of the imprisonment, are not stated in the record. It appears that the plaintiff in error was not present at the arrest; but several witnesses, as to whose credibility the evidence is conflicting, testified that the plaintiff in error, who was a rebel, admitted that he had "let the soldiers have a horse and saddle and a gun, to go and capture" the defendant in error; expressed himself in strong terms in favor of the arrest, and approved the same after it was made. One of the captors testified that the plaintiff in error was ignorant of

their intention to make the arrest; and that they took his horse and gun without his knowledge or consent.

Verdict for defendant; plaintiff appealed.

E. L. Gardenhire, for plaintiff in error.

John P. Murray, for defendant.

NELSON, J. (after stating the facts). Without critically weighing the credit of the witnesses or the force of their testimony, it may be assumed, after the verdict of the jury in this case, that there was evidence to satisfy the jury that plaintiff in error aided and abetted in making the arrest, and afterward fully sanctioned and approved it. Among other things, the circuit judge instructed the jury, in substance, that if the plaintiff below was a Federal soldier, and was arrested by Confederate soldiers, under orders of their commander, through the advice, information or encouragement of the plaintiff in error, who was a citizen, the fact that the parties who made the arrest were rebel soldiers, acting under the command of a superior officer, would be no protection or justification to the defendant in error.

Without particularizing the objections to this charge, we hold that it was contrary to the principles declared in the case of *Smith v. Brazelton*, recently determined at Knoxville, 1 Heis. 44 (2 Am. Rep. 678), and that the arrest and imprisonment of defendant in error, made, as they were, in obedience to the command of a superior officer, were lawful acts of war; and that, in the absence of proof of express malice, the plaintiff in error was not a trespasser in either procuring or encouraging such arrest. The principles declared in that opinion were very carefully considered, before they were promulgated, by the whole court; and satisfied, as we are, that they are well sustained by reason and authority, we do not regard it as our duty either to modify or retract them.

It appears from the record that two witnesses, who had been confined in rebel prisons—one of them at Belle Isle prison, at Richmond—were permitted to detail their sufferings and bad treatment in those prisons; and this in opposition to the direct objection of plaintiff in error to the admissibility of the evidence, and, also, when there was no proof that the defendant in error was confined in any, or, if in any, in what prison.

Wright v. Winningham.

It would be superfluous to cite authorities to show that the sufferings and bad treatment of persons who were not parties to the suit, and in no way connected with the cause, could not, upon any conceivable legal principle, be rightfully admitted as evidence in a suit with which such bad treatment and sufferings had no earthly connection. The admission of such testimony was a grave error. It was foreign to the cause, but well calculated to create prejudice in the minds of the jurors.

Without commenting on the verdict itself, or the strong affidavits presented on the application for a new trial, which tend to show that it was, in legal parlance, a "gambling verdict," we hold that his honor, the circuit judge, erred in refusing to grant a new trial; and accordingly reverse his judgment and remand the cause. See 2 Am. Rep. 678.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

THE ILLINOIS MUTUAL FIRE INS. Co., appellant, v. FIX.

(53 ILL. 151.)

Fire insurance—assignment of policy, effect of—violation of conditions by assignor—second insurance.

Where a policy of fire insurance is assigned as collateral to a mortgage, with the consent of the company, the assignee takes it subject to the conditions thereof, and no recovery can be had, merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract.

In an action by the assignor of a policy of fire insurance, for the use of the assignee, evidence to show that plaintiff set the building on fire is admissible.

It seems that a clause in a policy of fire insurance prohibiting a second insurance without the consent of the company is valid.

ACTION on a policy of fire insurance. The appellee, Fix, being indebted to Mayer, for whose use this suit is brought, executed to him his notes secured by mortgage on a brewery, and at the same time assigned to him a policy of insurance issued by the appellants upon the building and fixtures. The assignment was made with the consent of the company indorsed upon the policy. On the trial

The Illinois Mutual Fire Insurance Co. v. Fix.

the company offered to prove that the building was set on fire by the plaintiff, Fix; but the evidence was excluded. It also appeared that a second insurance had been obtained on the fixtures in another company. Appellant's policy contained a clause prohibiting double insurance without their consent. The company, therefore, asked the following instruction, which was refused:

"If the jury believe from the evidence that Pantalí Fix, after procuring the insurance in this cause, procured other insurance in the Aetna Insurance Company, upon the fixtures mentioned in the policy, and that he gave no notice of such insurance to the defendant in this cause, then the jury, in making up their verdict, will exclude the amount insured in the policy upon the fixtures."

Verdict and judgment for Fix; the company appealed.

Billings & Wise, for appellant, cited *Tillou v. Kingston Mut. Ins. Co.*, 1 Seld. 405; overruled in *Grosvenor v. Atlantic Fire Ins. Co., of Brooklyn*, 17 N. Y. 391; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, id. 401; *Carpenter v. Providence Washington Insurance Co.*, 16 Pet. 495; *King v. State Mutual Fire Ins. Co.*, 7 Cush. 5; *Macomber v. Cambridge Mutual Ins. Co.*, 8 id. 133; *Lorig v. Manufacturing Ins. Co.*, 8 Gray, 28; *Young v. Eagle Fire Ins. Co.*, 14 id. 150; *Fogg et al. v. Middlesex Ins. Co.*, 10 Cush. 346; 2 *Parsons' Maritime Law*, 40; *Pupke v. Resolute Ins. Co.*, 17 Wis. 378; *State Mutual Fire Ins. Co. v. Roberts*, 31 Penn. 438.

Davis & Gillespie, for appellee, cited *Poll v. Somerset Mutual Fire Ins. Co.*, 42 Me. 221; *Tillou v. The Kingston Mutual Ins. Co.*, 1 Seld. 405; *Allen v. Hudson River Mutual Ins. Co.*, 19 Barb. 445; *Traders' Ins. Co. v. Robert*, 9 Wend. 404; *Charleston Ins. Co. v. Rose*, 2 McMullen, 237; *Foster v. Equitable Mutual Fire Ins. Co.*, 2 Gray, 216; *New England Fire and Marine Ins. Co. v. Wetmore*, 32 Ill. 242; *City Fire Insurance Co. of Hartford v. Mark*, 45 id. 484.

LAWRENCE, J. (after stating the facts). On the trial, the company offered to prove that the building was set on fire by the plaintiff, Fix. The evidence was objected to by plaintiff's counsel, and the objection was sustained. This ruling presents the main question in the case, to wit, whether, where a policy of insurance has been assigned by the assured to one holding a mortgage on the

The Illinois Mutual Fire Insurance Co. v. Flx.

premises, with the consent of the company indorsed upon the policy, its validity can be destroyed by acts done by the assignor in violation of its conditions.

This question has received much discussion in the courts of New York, and the decisions first made have been deliberately overruled. It was first held, in the *Traders' Ins. Co. v. Robert*, 9 Wend. 404, that no act of the assured, after the assignment of the policy with the consent of the company, can impair the rights of his assignee.

This case was approved and followed in *Tillou v. The Kingston Mutual Ins. Co.*, 1 Seld. 406, the court holding that the assignment of a policy, with the assent of the insurer, creates new and mutual relations and rights between the assignee and the insurer, which cannot be impaired by a third person, over whom the assignee has no control. The question again came up in *Grosvenor v. The Atlantic Fire Insurance Co.*, 17 N. Y. 392, and in the *Buffalo Steam Engine Works v. The Sun Mutual Insurance Co.*, id. 401. In the first case, the policy was not assigned by the mortgagor to the mortgagee, but, by its original terms, the loss, in case of fire, was made payable to the mortgagee. The majority of the court held the case was not distinguishable from an assignment of the policy, and overruling the cases already cited, held the policy was avoided by certain acts done by the mortgagor in violation of its terms. One of the eight judges composing the court, dissented altogether, and two others concurred only on the ground that the case was not like one in which the policy had been assigned. In the other case, decided at the same term, and which was one of assignment, the majority of the court held the policy avoided by the acts of the assignor, the three judges dissenting.

In these two cases, the question involved received a much fuller discussion than was given to it when the former decisions were rendered. In reply to the argument of the court in 9 Wend., that the assignor could not be permitted to execute a release to the insurance company which would impair the rights of the assignee, and that he should not be permitted to do indirectly what he could not do directly, the court very justly say, this argument fails to distinguish between acts done for the purpose of discharging a liability, and acts which, by the terms of the contract, were necessary to be done or omitted, in order to continue the liability in force. The principle, however, laid down in the case in 4 Selden, that the assignment of a policy, with the assent of the

The Illinois Mutual Fire Insurance Co. v. Fix.

company, creates new relations and rights between the assignee and the company, is not wholly repudiated as never applicable, for it is admitted that, in cases where there has been an absolute sale of the insured property, the assured retaining no interest in it, and there has been an assignment of the policy to the purchaser with the consent of the company, such purchaser may be considered as becoming a party to the contract, taking upon himself the performance of its conditions, while the assignor, ceasing to be a substantial party, and having no interest in the subject-matter, could do no act affecting the rights of the assignee. The court insist, however, that this principle cannot be applied to an assignment to a mortgagee, because, in such cases, the mortgagor retains his interest in the property and in the policy, and whenever the mortgage debt is paid, the benefit of the policy reverts to him, or, in case the policy exceeds the amount of the mortgage, the surplus, in the event of a loss, would be payable to the mortgagor. The court further say, that the rule of the former cases would make insurance companies liable for risks which they never assumed, and against which their policies are intended to guard them, for, under this rule, a mortgagor, remaining in possession, might convert a building, insured as a dwelling-house, to a use vastly more hazardous, as by making it a place for manufacturing fire works, and still the company be required to pay, although one of the material terms of its contract was that its liability should cease in the event of such a change in the uses of property.

The supreme court of Pennsylvania, in *State Mutual Insurance Co. v. Roberts*, 31 Penn. 438, adopts the rule of these cases, in a well-considered opinion.

The supreme court of the United States in *Carpenter v. Providence Washington Insurance Co.*, 16 Peters, 495, lays down a similar principle.

This rule is also followed in *People v. Resolute Insurance Co.*, 17 Wis. 378.

On the other hand, the earlier New York cases were followed in *Pollard v. Somerset Mutual Fire Insurance Co.*, 42 Me. 226.

In this State the question is an open one. Counsel for appellee cite the *N. E. Fire and Marine Ins. Co. v. Wetmore*, 32 Ill. 221, and *City Fire Insurance Co. v. Mark*, 45 id. 482, as adopting the rule of the earlier New York cases. But in the first of these cases, the policy was issued directly to the mortgagees, and assigned by them

The Illinois Mutual Fire Insurance Co. v. Fix.

with the note and mortgage, and the question, in regard to which the case in 1 Selden was cited, was as to the right of the assignee to bring suit in the name of the assignors. In the case in 45 Ill. the assured had sold the stock of goods insured, and the policy had been assigned to the purchaser with the consent of the company. The court, in its opinion, cites the earlier New York cases only, but even under the rule laid down in the last case, in 17 N. Y., the assignee was entitled to recover, the transaction being a sale and not a mortgage.

This court has shown, in various cases, a disposition to hold insurance companies to a full measure of responsibility, but we are of opinion that the cases in 17 N. Y. stand upon the better reason.

The consent of insurance companies to an assignment of the policy by a mortgagor to a mortgagee, should not be construed as imposing upon them, as a consequence of such mere naked assent, a liability which they never would intentionally assume, and against which they take all possible pains to guard themselves, and must guard themselves in order to preserve their solvency. The principle contended for by counsel for appellee, and laid down in the earlier New York cases is, that no act of the assignor, done without the consent of the assignee, can invalidate the policy, so far as relates to the assignee. If this be true without limitation, then, as said by the New York court of appeals, a risk taken by a company at the lowest rates, because in the least hazardous class, might be changed, by the mortgagor remaining in possession, and without the concurrence of the mortgagee, to the class of extra-hazardous, and the liability of the company would remain the same. A detached dwelling-house might be converted into a powder magazine, or to some other use which would prevent any sound insurance company from taking the risk on any terms, and still, under the rule claimed by appellee, the company would remain responsible. The mortgagor might go further, and not only convert his building to extra-hazardous uses, but absolutely set it on fire, with a view of defrauding the company, as the appellants offered to prove was done in the present case.

We cannot adopt a rule which would lead to such results. In analogy to the case of absolute sales by the assured, we should be much inclined to hold to the rule announced in 1 Selden, if it were possible to separate the interest of mortgagor and mortgagee. But it is not, for the mortgagor is not only interested in the payment of the mortgage, but, where he pays the premium, the fruits of

The Illinois Mutual Fire Insurance Co. v. Fitz.

the policy absolutely belong to him, subject to the lien of the mortgagee. Where there is an absolute sale, there is no difficulty in determining the measure of the assignee's rights and the company's liabilities, for he stands in the position of receiving a new policy as owner, and becomes responsible for any extra-hazardous uses to which the building may be applied, a responsibility he cannot evade on the ground that the building is not under his control. But where there is no sale, but the policy is merely assigned as security, we are obliged to hold, either that the company is bound, absolutely to the assignee, no matter how far the conditions of its contract may have been violated, which would be a very unreasonable ruling, or that there is such identity of interest in regard to both the property and the policy, that there can be no recovery, even for the use of the assignee, if the assignor fails to comply with the conditions.

The utmost that can be claimed for an assignee in such cases is, that he should stand in the same position as if he had taken out a new and independent policy to protect his own interest as mortgagee. But, admitting such claim, we have no rule to guide us. It is impossible for us to say what conditions the company would deem it necessary to insert in such a policy for its own protection. It is very certain it would stipulate that the hazard to the building should not be increased, and thus would compel the mortgagee to take upon himself the responsibility of the mortgagor's acts, from which he could not escape by saying that his rights should not be prejudiced by the acts of a third person. It would necessarily result, from the nature of the interest insured, that its owner might be damnified by the acts of the mortgagor in possession, although beyond his control. Whether a company would also stipulate, in such a policy, that neither the mortgagor nor the mortgagee should obtain further insurance, without its consent, we do not know, though it is evident such a stipulation would be a wise precaution.

The history of the *Robert case* in 9 Wend. singularly illustrates the injustice of attempting to base a judgment against an insurance company, in favor of the mortgagor, upon the equities of his assignee. In that case the judgment was rendered in favor of Robert, the mortgagor, for the use of Bolton, his assignee, on the ground that, though Robert had violated the policy, this could not prejudice Bolton. After the rendition of the judgment, and before its payment, Robert paid off the mortgage, and threatened the

The Illinois Mutual Fire Insurance Co. v. Flx.

insurance company with an execution. The company moved the court for a perpetual stay, which was granted, the court holding, consistently with its former ruling, that Robert had no equitable rights under the policy. 9 Wend. 404, 474. From this order an appeal was taken to the court for the correction of errors, and that court held, as the original decision was unreversed, it was conclusive upon the rights of the parties, and as the mortgage had been paid, the benefit of the judgment reverted to Robert, the mortgagor. He thus received the full benefit of the policy, although he had forfeited all rights under it, and a judgment had been rendered in his favor only in consequence of the equities of his assignee. 17 Wend. 631.

It is, in our opinion, very clear, if we attempt to dispose of cases of this character on the theory that the assignment is to be treated as a new policy, issued directly to the mortgagee, for his exclusive benefit, and to adjust the rights of these parties in accordance with what we may suppose such a policy would contain, we shall be wandering in a labyrinth where there would be but one thing certain, and that is, that great injustice would be done these companies. We should practically be enforcing liabilities against them which they never intended to incur, and giving to the mortgagor the benefit of a policy in which he has forfeited all his rights.

We deem it safer and more just to say that, where a policy is assigned as collateral to a mortgage, though with the consent of the company, the assignee takes it subject to the conditions expressed upon its face, or necessarily inhering in it, and that no recovery can be had merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract.

The evidence offered to show that the plaintiff set the building on fire should have been admitted, and the instruction asked for by defendants, in regard to the effect of a second insurance, should have been given.

Judgment reversed.

 Bartholomew v. St. Louis, Jacksonville & Chicago Railroad Co.

 BARTHOLOMEW, appellant, v. ST. LOUIS, JACKSONVILLE & CHICAGO
RAILROAD COMPANY.

(53 Ill. 227.)

Common carrier—railroads—liability as warehousemen.

In an action against a railroad company for the loss of baggage, it appeared that the baggage had arrived at its destination and been placed in the depot by the company where it was stolen by burglars during the night. *Held*, that the baggage "should have been stored in a safe and secure warehouse to exonerate the company" from liability as a common carrier.

ACTION by Bartholomew *et ux.* against the St. Louis, Jacksonville & Chicago Railroad Company.

It appears, that Jennie E. Bartholomew, one of the plaintiffs in error, became a passenger on the road of defendants in error, from Alton to Delhi, a station on the road, and arrived, with her baggage, at the latter place. Upon her arrival, no teams or means being at hand to carry her and her baggage to her father's, a distance of three miles in the country, her trunk was left at the depot until it should be called for and taken away. The trunk was placed in the depot, and, during the night after its arrival, the station-house was entered by burglars, who broke open her trunk and took therefrom several articles which it contained, and also stole some tickets and other articles from the company. It appears that Mrs. Bartholomew arrived at the depot late in the evening, which rendered it inconvenient, if not altogether impracticable, to send for and get her trunk from the depot before the next morning. On these facts the jury, under the instructions, found for defendants in error.

G. W. Herdman, J. W. English and A. E. Pinero, for plaintiffs in error (appellants), cited *Redfield on Railways* (2d ed.), 232; *Powell v. Myers*, 26 Wend. 596; *Hall v. Cheney*, 36 N. H. 31; *Angell on Carriers*, §§ 114, 320; *Redfield on Railways* (2d ed.), 253, 254; *Story on Bailments*, § 604; *Fenner v. The Buffalo and State Line R. R. Co.*, 46 Barb. 103; *Curtis v. The Avon, Geneseo, etc., R. R. Co.*, 49 id. 148; *Jones v. The Norwich and New York Transportation Co.*, 50 id. 193; *Cole v. Goodwin*, 19 Wend. 251; *Hol-*

Bartholomew v. St. Louis, Jacksonville & Chicago Railroad Co.

lister v. Nowlen, id. 234; *Cary v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *Moses v. Boston & Maine Railway*, 32 N. H. 523; *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Wood et al. v. Crocker*, 18 Wis. 345; *Gillhooly v. The New York & Savannah Steam Nav. Co.*, 1 Daly, 197; *Camden & Amboy R. R. and Trans. Co. v. Belknap*, 21 Wend. 354.

A. M. Church, for defendants in error, cited *Richards v. M. S. & N. I. R. R. Co.*, 20 Ill. 404; *Porter v. C. & R. I. R. R. Co.*, id. 407; *The C. & A. R. R. Co. v. Scott*, 42 id. 132; *Minor v. The C. & N. W. R. R. Co.*, 19 Wis. 40; *Roth v. Buffalo, etc., R. R. Co.*, 34 N. Y. 548; *Hathorne v. Ely*, 28 id. 78.

WALKER, J. (after stating the facts). It was held, in the cases of *Richards v. The Michigan Southern & Northern Indiana R. R. Co.*, 20 Ill. 404, and *Porter v. The Chicago & Rock Island R. R. Co.*, id. 407, that when a railroad transports goods and they reach their destination, the liability of the company ceases as common carriers, when they are unloaded, and placed safely and securely in their warehouse, under the charge of competent and careful servants, ready to be delivered, and the liability of warehousemen for hire attaches. In the *Chicago & Alton R. R. Co. v. Scott*, 42 Ill. 132, it was said, that to change the relation or duty of the company, from that of a common carrier to that of a warehouseman, the warehouse must be a safe and secure place, in which the goods are stored.

These cases all related to freight in its ordinary sense, as distinguished from baggage, which is usually taken with, and attends persons while traveling. But no difference is perceived between baggage given in charge of the company, and ordinary freight. In each case the company are paid to transport the property. On freight the money is paid directly and simply for its transportation, while with baggage, the price paid for its transportation is included in the charge for the ticket the owner purchases for his transportation. In each case the company becomes equally liable for its safe carriage and delivery, and are under the same responsibility for loss or injury it may sustain. It is true, the two different kinds of property are carried on different trains, but that cannot matter, as their liability is in all respects the same. There being no difference in the duty or liability of the carrier in the two cases, they should be governed by the same rules.

Bartholomew v. St. Louis, Jacksonville & Chicago Railroad Co.

When defendants in error, therefore, transported the trunk to Delhi, to relieve themselves from the liability as common carriers, they should have stored the trunk in a safe and secure warehouse, and then the new relation of a warehouseman would have attached. But the burden of proof is upon the common carrier, to show that the property was stored in a safe and secure warehouse, and until this appears, the company cannot be exonerated from the liability of a common carrier. In the case of the *Chicago, Rock Island & Pacific Railroad Co. v. Fairclough*, 52 Ill. 106, it was held, that where the railroad company placed baggage in a room of their depot, and a pane of glass in one of the windows of the room which was without blinds, was only held in its place by tacks, and burglars removed the glass and made an entrance through the opening, the baggage was not safely stored, and the company were liable. In the case at bar, for aught that appears, the depot in which this trunk was stored may have been entirely insecure against the entrance of burglars. The instructions given for defendants in error entirely ignore the requirement that the trunk should have been stored in a safe and secure warehouse to exonerate the company, and in this they were erroneous, and should have been refused, or modified before they were given. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

CHICAGO AND ALTON RAILROAD CO., appellant, v. MURPHY.

(55 ILL. 386.)

Master and servant—injuries received by employee of railroad company.

In an action by plaintiff against a railroad company to recover for the death of the intestate, while in the employ of the company, caused by the carelessness of an engine driver, *held*, that the following instruction contained the rule of law applicable to the case: "If the jury believed, from the evidence, that both the deceased and the engine driver, at the time deceased was injured, were in the employment of the railroad company, and that their ordinary occupations in such service bore such relations to each other, that the careless or negligent conduct of the engine driver endangered the safety of the deceased, then such danger was incident to the employment of the deceased, and the plaintiff cannot recover."

ACTION on the case. The facts appear in the opinion.

Williams & Burr, for appellants.

Welden, Tipton & Benjamin, and *John H. McNulta*, for appellee.

LAWRENCE, J. This is an action brought by the appellee, as administratrix of James Murphy, deceased, against the appellants, for wrongfully causing the death of said Murphy, who was at the time in appellants' service. There is no dispute in regard to the facts. The deceased was one of several workmen, under the immediate charge of one Hill, as foreman, whose duty consisted in examining all trains on their arrival at the railway station in Bloomington, and making all needed repairs. He and a fellow laborer had been engaged in "jacking up" and repairing a car in a freight train, and having finished his work had started for the shop where they kept their tools, when, in passing down between the rails of the main track, he was overtaken and struck by a switch engine, and so injured that he soon after died. The switch engine was constantly engaged on the station grounds, and although under the immediate control of the yard master, it was used for whatever purpose it might be required, and, among others, for switching such car or cars as were to undergo repairs by Hill's men. In that way, it was more or less connected with the work in which deceased was engaged, and

Chicago and Alton Railroad Co. v. Murphy.

the engineer managing this engine, and the men of Hill's "repair gang," as it was called, were strictly fellow servants of a common master, having different functions, it is true, but engaged in the same general department, to wit, the doing of the needed work upon the depot grounds for the purpose of dispatching the various trains. If a car in a train which had just arrived was found to need repairs, Hill would advise the yard master, and the latter would have the switch engine place the car in such position in the yard as he might think proper, when Hill's men would make the necessary repairs.

Under these circumstances, we are wholly unable to hold, as insisted by counsel for appellee, that the deceased and the engineer were not fellow servants in such a sense as to subject them to the well-established rule exempting the common master from liability in cases of this character. Admitting, as we do, the carelessness of the engineer upon the switch engine, in neglecting either to ring the bell or blow the whistle, and waiving the question as to whether the deceased was not chargeable with equal negligence, we are clearly of opinion that this case cannot, in principle, be distinguished from the former cases decided by this court, in which we held, under an analogous state of facts, that no recovery could be had. It is true, we said in *Chicago and Alton Railroad Co. v. Keeja*, 47 Ill. 108, that the duties of an employee of a railway company might be so entirely distinct from all occupation upon its trains as to leave him at liberty to pursue the usual legal remedies for injuries received while a passenger, and we instanced the case of a book-keeper in a railway office, injured upon a train through the carelessness of the engineer. We have no wish to modify what was there said, and we have shown in the opinion pronounced in the case of *Lalor v. The Chicago, Burlington & Quincy R. R. Co.*, 52 id. 401, that we are not disposed to extend the exemption from liability claimed by railway companies under this rule, where one employee has been injured by the negligence of another. In the last-named case, we held the company liable on the ground that the plaintiff had been employed to do work only ordinarily hazardous, and had been required to perform other work, for which he was not engaged, and which was extra hazardous. But there is nothing in either of those opinions which would make the appellants in this case chargeable with damages; and to hold the company liable, would be to disregard the almost uniform current of authorities, both in the American and English courts. It is, of course, not easy

Chicago and Alton Railroad Co. v. Murphy.

to define who are to be considered fellow servants, in the sense of this rule, with such perfect accuracy that doubtful cases will not occur; but, in our opinion, the principle announced in one of the instructions asked by the defendant is correct. That instruction was as follows:

"If the jury believe, from the evidence, that both the deceased and the engine driver, at the time deceased was injured, were in the employment of the railroad company, and that their ordinary occupations in such service bore such relations to each other that the careless or negligent conduct of the engine driver endangered the safety of the deceased, then such danger was incident to the employment of the deceased, and the plaintiff cannot recover in this case."

This instruction was refused, perhaps because the court considered its substance was embodied in one of those given for defendant, but in that event the court should have set aside the verdict as against the instructions. When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow servants, within the meaning of this rule. The fact that the engine driver received his orders from the yard master, and the deceased received his from the foreman of the repair gang, we cannot consider material in this case. They were still the fellow servants of a common master, working in the same place, to subserve the same interests, and with their occupations so related to each other that the safety of the deceased necessarily depended, to a greater or less extent, upon the care of the engine driver, and this he must have known when he entered the service.

We do not deem it necessary to dwell further on this case; but besides the cases heretofore decided by this court, we refer to the following authorities, cited by counsel for appellants, as fully sustaining the view here expressed. *Lovegrove v. London, Brighton & S. C. Railway Co.*, 111 E. C. L. 669; *Morgan v. Vale of Neath Railway Co.*, Law Rep. Q. B. vol. 1, p. 149; *Tunney v. Midland Railway Co.*, Law Rep. C. P. vol. 1, p. 291.

A new trial should have been granted by the court. The judgment must be reversed and the cause remanded.

Judgment reversed.

TRUSTEES, plaintiffs in error, v. GARVEY.

(58 ILL. 401.)

Subscription — liability of subscriber.

A person subscribed toward the payment of a debt due for the building of a church, and the trustees borrowed money to pay the debt on the faith of the subscription. *Held*, that the subscriber was bound.

ACTION in assumpsit by the trustees of the Methodist Episcopal Church of Illiopolis, to recover the sum of \$25 from defendant, William F. Garvey. It appeared that defendant had subscribed toward the payment of a debt due for the building of a church edifice; and that the trustees of the church had, in their corporate capacity, but on the faith of the subscription list, borrowed money with which to pay the church debt. Judgment for defendant. Plaintiffs bring error to this court.

I Stuve, for plaintiffs in error.

Hay, Greene & Littler, for defendant in error.

LAWRENCE, J. (after stating the facts). It is admitted by counsel for the defendant, that where a person subscribes to a public enterprise, and work is done, money expended, or liability incurred, on the faith of such subscription, it becomes binding. Such has been the decision of this court in various cases, which are cited in *McClure v. Wilson*, 43 Ill. 356. But it is claimed that the present case does not fall within this rule, as the church had been built prior to the subscription, and the trustees, although they borrowed money in their corporate capacity, on the faith of the subscription, did not thereby increase their liability, but merely changed their creditors.

As a matter of public policy, courts have been desirous of sustaining the legal obligation of subscriptions of this character, and in some cases, as in *George v. Harris*, 4 N. H. 535, have found a sufficient consideration in the mutuality of the promises, where no fraud or deception has been practiced. But, while we might be unwilling to go to that extent, and might hold that a subscription could be

Mayfield v. Moore.

withdrawn before money has been expended, or liability incurred, or work performed on the strength of the subscriptions, and in furtherance of the enterprise, yet we are of opinion the present case fairly falls within the rule established in this court and admitted by counsel. Although the church trustees have not increased their liability, they have, on the faith of this subscription, incurred a new liability to new parties. They have borrowed money, relying upon this subscription as a means of payment, and the fact that they have used the money to discharge a pre-existing debt does not change the fact that they have incurred a new and different liability. The lender of the money may have relied for his payment, not merely on the credit of the trustees in their corporate capacity, but on the subscription list in their hands. The record shows a sufficient consideration, and the judgment should have been for the plaintiffs.

The judgment is reversed and the cause remanded.

Judgment reversed.

MAYFIELD, appellant, v. MOORE.

(53 ILL. 428.)

Office — Liability of wrongful incumbent to successor — fees and emoluments.

A. assumed the duties of an office under an apparent claim of right, and it was subsequently judicially determined that the office belonged to B. *Held*, that B. could recover of A. the fees and emoluments received by him, while in office, after deducting the necessary expenses in earning them.

THIS was an action of assumpsit, brought by appellant, in the Morgan circuit court, against appellee, to recover fees received by the latter as sheriff, and collector of the State, county, and other revenue. It appears that, on the 6th of November, 1866, appellant and appellee were opposing candidates for the office of sheriff of Morgan county, in this State. On a canvass of the vote of the county, a certificate of election was given to appellee, who afterward received a commission, and entered upon and discharged the duties of the office, from the 17th day of November, 1866. till the

Mayfield v. Moore.

13th day of January, 1868. Soon after the canvass of the vote was had, appellant gave appellee notice that he should contest the election, upon the ground that illegal votes were cast for appellee more than sufficient to change the result, and give appellant the office.

Justices of the peace were selected in the mode pointed out by the statute. A trial was had, which resulted in favor of appellant, and finding him, on the evidence adduced, to be entitled to the office. From this decision, appellee removed the case to the circuit court of Morgan county, by appeal. A trial was there had, with a similar result. To reverse the judgment of the circuit court, appellee sued out a writ of error to the supreme court, which was subsequently dismissed by the court, and appellant was duly commissioned, and entered upon the duties of the office. He then brought this suit to recover the fees and emoluments of the office received by appellee while acting as sheriff. A trial was had in the court below, where appellant recovered a judgment for \$34.55, the amount of fees received after the rendition of the judgment by the circuit court, and before the office was surrendered to appellant.

On the trial below, appellant offered to prove to the jury the sum of money received by appellee while he exercised the office, as fees, allowances and emoluments, but on the objection of the attorneys for appellee, the court refused to permit the proof to be made, and confined him to the receipt of fees, commissions and profits which were received after the decision of the case by the circuit court. This ruling of the circuit court is urged as ground of reversal.

Ketcham & De Leww, for appellant.

McClure & Stryker, *H. E. Case* and *H. E. Dummer*, for appellee.

WALKER, J. (after stating the facts). It is urged by appellant, that, he being entitled in law to the office, the fees and emoluments incident to it followed the title, and were vested in him, on the familiar rule that, where one person has received the money which, in equity and good conscience, belongs to another, he may sue for and recover the same in an action for money had and received. We presume it will not be questioned that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place; that, when such an officer performs the duties of the office, he may demand and receive

the compensation allowed by the law. It cannot be that, in such a case, another person can legally claim such compensation. An officer, having rendered services, is as fully entitled to the compensation fixed by law as is any other individual entitled to a reasonable compensation for labor and skill rendered for an individual. The fees and emoluments are legally his.

We also find that the authorities have gone still further, and held, that where a person has usurped an office belonging to another, and received the accustomed fees of the office, money had and received will lie at the suit of the person entitled to the office, against the intruder. *Arris v. Stukely*, 2 Mod. 260; 1 Selw. N. P. 68. The same rule was announced and enforced in the case of *Crosbie v. Hurley*, 1 Alcock & Napier, 431. In this last case there was a contest as to the title to the office, and the person recovering the title to it sued the other who had acted, and recovered the fees and emoluments received while in possession and exercising the duties of the place. The same rule has been adopted in this country, and seems to be based in common-law rules.

It is said by Blackstone in his Commentaries, vol. 2, p. 36, that officers have a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, and are also incorporeal hereditaments, whether public, as those of magistrates, or private, as bailiffs, receivers, or the like; for a man may have an estate in them, either to him and his heirs, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they, perhaps, might vest in executors or administrators. Thus it is seen that the right to the fees and emoluments are stated to be co-extensive with the office. This is undoubtedly correct, as it is analogous to every other thing capable of ownership. No principle of law can be clearer than that the owner of lands or chattels is entitled to the products, increase or fruits flowing from them. The fees of an office are incident to it as fully as are the rents and profits of lands, the increase of cattle, or the interest on bonds or other securities.

A person owning any of those things is, by virtue of such ownership, equally entitled to the issues and profits thereof as to the thing itself. If, then, appellant was the owner of and held the title to the office of sheriff, he was as clearly invested with the right to receive the fees and emoluments. They were incident to and as clearly con-

Mayfield v. Moore.

nected with the office as are rents and profits to real estate or interests to bonds, and such like securities. See *Glascocock v. Lyons*, 20 Ind. 1; *Petit v. Rousseau*, 15 La. 239; *Dorsey v. Smith*, 28 Cal. 21, and *The People v. Tieman*, 30 Barb. 193. We think that, on both reason and authority, appellant is entitled to recover the fees and emoluments arising from the office while it was held by appellee.

It is, however, urged that the appellee surrendered the office as soon as it was finally judicially determined that appellant was entitled to it, and is, therefore, not liable to account for any fees but those received after the circuit court decided the case on appeal from the three justices of the peace. This is not a question of intention, but a question of legal title to the sum in dispute. Under the law, so soon as a majority of the votes were cast for appellant, at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the right to the place. The commission was evidence of the title, but not the title. The title was conferred by the people, and the evidence of the right by the law.

Nor can it be successfully claimed that appellee was not in the wrong. He was bound, before entering upon the discharge of the duties of the office, and the receipt of its emoluments, to know whether he had title. His position was the same as a person who, having a defective title to a tract of land, and enters into possession, and the receipt of the rents and profits. He entered at his peril. Nor do we perceive any hardship. After the vote was canvassed by the clerk and a justice of the peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprised of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated upon another. He has intruded into appellant's office without right, and has received the profits of the office, and, like the person entering into the land of another with a defective title, he must answer for the profits.

Inasmuch, however, as appellee obtained the certificate of election, and a commission was issued to him, he was acting in apparent right, and, so far as this record discloses, he resorted to no fraudu-

lent or improper means to produce that result; he does not occupy the position he would had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses in earning them. This being an equitable action, it should be governed, in this respect, by the same rules that would obtain had this been a bill for an account, instead of an action for money had and received. He should have only a reasonable allowance for the necessary expense in earning the fees and emoluments. Had he intruded without pretense of legal right, then a different rule would, no doubt, have been applied.

In adopting the time when the circuit court decided that appellant was entitled to the office as the period from which he was entitled to have the fees and emoluments of the office, the circuit court erred. That decision was no more potent to confer the right to the office than was the decision of the three justices of the peace. It, as we have seen, was not the decision, but the vote of a majority of the electors of the county, that conferred the right. The court, on the evidence, found and declared the title, but did not confer it. We have seen that appellant was entitled to the office and its emoluments from the time appellee entered into it, and became liable to account for them from that date until he ceased to act and receive the fees and perquisites of the office.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

 Toledo, Peoria and Warsaw Railway Company v. Pindar.

TOLEDO, PEORIA AND WARSAW RAILWAY COMPANY, appellant,
v. PINDAR *et al.*

(58 Ill. 447.)

Railroad company—negligence—fire communicated from locomotive.

A building belonging to a railroad company took fire from sparks from one of their engines, and from this building fire was blown across the street to the storehouse of P., which, with several thousand dollars in money contained therein, was consumed. In an action by P. to recover for the loss, *held*, (1) that it was a question for the jury whether the company had taken reasonable precautions to prevent the escape of sparks from the engine; (2) that, as the loss of the money could have been prevented by reasonable efforts for its preservation, the company were not responsible as to it; (3) that the question whether the injury sustained was too remote was for the jury.

ACTION by Pindar *et al.* against the Toledo, Peoria and Warsaw Railway Company. The facts appear in the opinion.

Ingersoll & McCune, for appellants, as to the question of remoteness of injury, cited *Pennsylvania Railroad Co. v. Kerr*, 1 Am. Rep. 431, and *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 210.

J. W. Straight, with whom were *M. W. Packard* and *L. Weldon*, for appellees, upon the same question, cited *Sedgw. on Meas. of Dam.* 56, 65, 77, 85, 86, 123; 2 *Greenlf. Ev.* 256; 3 *Pars. on Cont.* 179, 180, note *v.* 223, note *d*; 8 *Pick.* 356; *Dickinson v. Boyle*, 17 *id.* 78; *Barnum v. Vandusen*, 16 *Conn.* 200; *Trask v. Hartford & N. H. R. R. Co.*, 2 *Allen*, 332; *Powell v. Salisbury*, 2 *Y. & Jer.* 391; *Fletcher v. Rylands*, *L. R.*, 1 *Exch.* 265; 12 *Jur. N. S.* 503; *S. C.*, 11 *id.* 714, cited in 1 *Redf. on Railw.* 457; *Scott v. Shepherd*, 2 *W. Black.* 892; *King v. Huggins*, 2 *Ld. Raym.* 1574; *Parkhurst v. Foster*, 1 *id.* 480; *Roswell v. Prior*, 12 *Mod.* 639; *Toledo, Wabash & Western Railway Co. v. Harmon* 47 *Ill.* 298; *Bass v. Chicago, Burlington & Quincy R. R. Co.*, 28 *id.* 9; *Illinois Cent. R. R. Co. v. McClellan*, 42 *id.* 355.

WALKER, J. It appears from the record in this case, that about the 1st day of October, 1867, a train on appellants' road, in charge

Toledo, Peoria and Warsaw Railway Company v. Pindar.

of the employees of the company, passed through the town of Fairbury. It appears that fire was communicated in several places in the village, which was extinguished without producing any serious injury. But the "Dresser Warehouse," a building erected by the company, also took fire and was consumed. There being a high wind at the time, fire was blown across the street and communicated to the store of appellees, consuming the same, together with some \$3,600 or \$3,700 in treasury and bank notes, and a large amount of goods, as appellees contend. This suit was brought to recover for the loss, and on the trial below the jury found a verdict in favor of appellees for the sum of \$14,000, upon which, after overruling a motion for a new trial, the court rendered a judgment, to reverse which this appeal is prosecuted.

It is insisted that there was carelessness on the part of the employees of the road, from which this injury resulted; that had due care been observed the accident would not have occurred, and the injury would have been avoided. It is also claimed that the engine threw an unusual quantity of sparks and fire, and owing to the dry weather and the highly combustible condition of the buildings near the road, the company are chargeable with gross negligence in failing to provide against the danger of communicating fire along the line of their road.

These bodies should be held to the exercise of due diligence in operating their machinery. They should be required to provide and keep constantly in use, and in proper repair, the most approved machinery to prevent fire from spreading from their engines to the farms and buildings along the line of their roads; and if an overload of their engines would, with the best appliances in use, in generating steam, produce the escape of sparks and fire to a dangerous extent, then such conduct would be gross negligence. But if the company have provided, and have attached and in proper condition the best appliances, and have only the proper amount of weight of train attached, then the company have not, in making up their train, or in attaching an engine thus equipped, been guilty of negligence, and, unless wanting in some other requirement, they should not be held guilty of such negligence as requires them to respond in damages. Whether in this case there was such negligence was a question for the determination of the jury from all of the evidence on the trial. It was for them to say whether the fire was communicated from the engine, and, if so, whether the company had observed

Toledo, Peoria and Warsaw Railway Company v. Pindar.

the proper precautions for its prevention, or were guilty of negligence; and whether they have found correctly we do not propose to inquire, as the judgment of the court below must be reversed on another ground, leaving the question of negligence and responsibility of the company under the evidence to another jury, unbiased by any views we may entertain on that question.

It appears from the testimony of one of appellees and their witnesses, that the money was in the till of the store, and in a bureau drawer in the upper story of the house, and it appears there was nothing to prevent Henry Pindar, or his sister, Miss Pindar, from saving it. There were two pairs of stairs leading from the store to the room in which the bureau containing the money was situated, and there was no obstruction preventing access to it. Appellee, Henry Pindar, testifies that there was nothing to prevent his saving the money had he thought of it; that failing to do so was all that prevented his saving it. Miss Pindar testifies that she thought of it, but in the confusion forgot it, and that she could have saved it had she not forgotten it.

Even if appellants were guilty of negligence, appellees were bound to use reasonable efforts to preserve their property. When the fire escaped they had no right to fold their hands and permit their property to be consumed without effort for its preservation, and then claim the right to recover the loss from the company. It is incomprehensible to us, that where it was so accessible and easily secured, no effort was made to remove the money. Unless he was careless or even reckless, we suppose his first thought would have been of the money. Unless indifferent of his loss, we do not comprehend why appellee should have thought of the horses, of comparatively small value, and not of so large a sum of money. Such a course of action would seem to imply a high degree of indifference to his interest, or strong feelings of humanity; but if the latter, we are not prepared to say that appellants should be prejudiced thereby.

There was nothing to prevent the preservation of the money, and failing to do so, appellees must sustain the loss. Had it required effort of an unusual or dangerous character, the case would have been different. But we fail to see that there was danger, and but slight effort was required to obtain it, and thus prevent its destruction. In this respect the evidence fails to sustain the verdict, and the judgment must be reversed.

After the case was submitted on briefs and arguments, appellants

Chicago and Alton Railroad Company v. Randolph.

have filed a further brief, in which they raise the question whether the facts do not show that the injury was too remote to authorize a recovery. This question seems now to be raised for the first time in the case. It is a question of fact for the jury, to be found under the instruction of the court, and as they have not passed upon it, and as the case will be submitted to another jury when the facts proven, for aught we know, may be different, we deem it improper to discuss the evidence on the question, but leave the parties to contest it before another jury, who have the right to pass upon it unprejudiced by any views we may entertain of the evidence.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

NOTE. — See *Hodell v. The Long Island Railroad Co.*, 4 Am. Rep. 688; also, *Smith v. The London & Southwestern Railway Co.*, L. R., 5 C. P. 98; *Perley v. Eastern Railroad*, 98 Mass. 414; *Hewey v. Nourse*, 64 Me. 280. — REP.

CHICAGO AND ALTON RAILROAD COMPANY, appellant, v. RANDOLPH.

(58 ILL 510.)

Railroad company — injury to passengers — contributory negligence.

Plaintiff purchased a ticket at L. on defendant railroad, for A., and got upon a freight train, while it was moving slowly. The conductor took the ticket; the train did not stop at A., and plaintiff in getting off was injured. Held, (1) that if plaintiff left the train voluntarily, although at the suggestion of the conductor, it was a question for the jury, whether he acted as a prudent man under the circumstances; (2) that, as the train was a freight train, and not advertised to stop at A., the taking up of the ticket did not imply an undertaking on the part of the company to put plaintiff off safely at that place.

THIS action was brought by appellee, in the Logan circuit court, against appellants, to recover for damages received by him while leaving appellants' train of cars, about the 21st of September, 1868. It appears that, on the evening of the day the injury was received, appellee procured a ticket at Lincoln for the station at Atlanta, and got upon a freight train while it was in motion, the

Chicago and Alton Railroad Company v. Randolph.

employees not intending to stop at the station at Atlanta. There was another passenger got on the train at the same time, who was going to the same place. The train was a through stock and freight train, which stopped regularly at certain stations for fuel and water, but not at others, unless signaled to do so to take stock from them, or where there was freight to be delivered.

There is no evidence as to whether appellee made any inquiry, when he purchased his ticket, to learn whether the train would stop at Atlanta. Appellee, and the other passenger who got on the train at the same time, both swear that before leaving Lincoln the conductor informed them that it would. This is denied by the conductor, who swears he was not in the caboose while at Lincoln, and not until they reached Lawnsdale, when he took up the tickets of appellee and the other passenger, when, he swears, he informed them the train would not stop at Atlanta, unless there should be stock at that point for shipment, but that he would run very slowly on the grade south of Atlanta, where they might jump off safely if they chose, which they agreed to do. The conductor seems to be corroborated in his statement by the brakeman and another passenger on the train.

It appears that when the train reached the grade and was running slowly, the conductor informed appellee and the other passenger for Atlanta, that then was their time to leap from the train, which they refused to do, whereupon they were informed that the train would not stop. On reaching that point, both men went out on the platform, and appellee leaped from the train, and in falling injured himself, but the other passenger remained on the train and was carried to the next station, where he was put off without injury. On a trial in the court below, appellee recovered a verdict for \$1,200, upon which judgment was rendered, and the case is brought to this court on appeal, and various errors are assigned.

Church & Hay, Green, & Little for appellants.

Weldon, Tipton & Benjamin, for appellee.

WALKER, J. (after stating the facts). It is contended by appellee, that he leaped from the train under the orders of the conductor; but on the other side it is denied that the conductor gave any such orders. or that he, at that time, even made any such suggestion that

he could or might leap from the train in safety. On the trial, appellants asked this instruction, but it was refused:

"The court further instructs the jury, for the defendant, that even if the jury should believe, from the evidence, that the conductor or brakeman told the plaintiff, at the time he jumped off the train, that he would do so with safety, and yet left it voluntary with plaintiff to get off or not, then what the conductor or brakeman might have said at the time (if the jury believe, from the evidence, any thing was said by them) did not release plaintiff from the duty of exercising reasonable judgment and caution as to whether it was safe to get off or not. If the jury believe, from the evidence, that, under all the circumstances existing at the time, a man of ordinary prudence, situate as the plaintiff was, would not have jumped off, the jury should find for the defendant."

It is urged that it was error in the court to refuse this instruction.

In the conflict in the testimony, this instruction should have been given. If the conductor only gave it as his opinion that appellee could leap from the train in safety, and appellee acted on his suggestion, still it was his duty to exercise his judgment whether or not it was safe; and if the conductor only gave it as a matter of opinion, still, if the danger was so apparent that a prudent man, similarly situated, would not have attempted to leap from the train, then appellee was guilty of negligence, and should not be permitted to recover. He was bound to exercise ordinary prudence, if left to act voluntarily, and was not acting under constraint. The instruction only asserted these propositions, and it should have been left to the jury to determine whether appellee was under constraint when he leaped, and if not, whether he acted with ordinary prudence.

It is also urged that the court erred in refusing to give appellants' tenth instruction, which is this:

"If the jury believe, from the evidence, that the train in question sometimes did and sometimes did not stop at Atlanta, and that this was known to the plaintiff before getting on said train, or before the same left Lincoln, then it was the duty of the plaintiff to ascertain, from some one authorized person, before becoming a passenger, whether said train would or would not stop at Atlanta on the trip in question. And if the jury believe, from the evidence, that the plaintiff got on said train, knowing such stoppage to be uncer-

Chicago and Alton Railroad Company v. Randolph.

tain, then the defendants were not bound to stop said train at Atlanta for his accommodation, and the taking of plaintiff's ticket by the conductor did not constitute a contract to stop at Atlanta."

No one will question the legal right of a railroad company to appropriate a portion of their trains exclusively to the carrying of freight, and to entirely exclude passengers from such trains. Their obligations to the public only require them to furnish sufficient passenger trains to accommodate the travel, and such freight trains as the business of the country along their lines requires. They are not required to carry passengers on their freight trains, or freight on their passenger trains. But they may, if they choose, do either. It then follows, that when a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. When he obtains a ticket, he has a right to go to the place for which it calls, on any train that usually carries passengers to that place. But he does not acquire the right to insist that the company shall send him on a special train, or out of the customary course of their road.

When a traveler obtains such a ticket, he should inform himself as to the usual mode of travel on the road, and so far as the customary mode of carrying passengers is reasonable, he should conform to it. These companies have passenger trains that only stop at the principal stations on their roads, and the right, so far as we know, has never been challenged, when they furnish a reasonable number of other trains, stopping at all stations, to accommodate public travel. And when a person purchases a ticket, he should ascertain whether the train will only stop at the principal stations, or at all of them, before he gets on a passenger train; and were he to get on one that was not accustomed to stop at the station to which he designed to go, he would not, without an agreement to stop, have any right to insist upon the company's changing the course of their business for his accommodation. The requisite information can always be had from the agent when the ticket is procured, and it is but reasonable to require passengers to obtain the information and to act upon it.

If, then, the company may run passenger trains that only stop at designated stations, furnishing reasonable means for carrying passengers to all their stations, it is more reasonable that they may run freight trains which only stop at certain stations for fuel and water,

Winnesheik Insurance Co. v. Holzgrafe.

or at such other stations as the transportation of stock or freight may require. And it is but reasonable that the company may exclude all passengers from such trains, or only carry them to the places at which they are accustomed to stop; and if a person gets upon such a train, without any agreement that they will stop at an unusual place of stopping, he cannot require the company to change the usual course of their business for his accommodation, and to serve his convenience. Should a person go on such a train, without the consent of the employees of the road, the taking up of his ticket merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place. In such a case the passenger is in the wrong, and has no right to insist that he should be safely put off at the point he desires, or be carried through without charge. The instructions are in harmony with these views, and should have been given. For the refusal to give these instructions the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

WINNESHEIK INSURANCE CO., appellant, v. HOLZGRAFE.

(53 Ill. 512.)

Fire insurance — parol contract for — powers of agent.

Plaintiff, at the solicitation of the agent of a fire insurance company, signed an application for a policy, wherein it was provided that the policy should take effect from the day the application was approved, and gave his note for the premium. The agent gave a receipt for the note, at the same time promising plaintiff that the policy would take effect from the date of the application. The application was sent to the principal office, and was rejected; but before the agent had informed plaintiff of the failure of the negotiations, the property proposed to be insured was destroyed by fire. *Held*, that there was no valid contract of insurance.

THIS was a bill in chancery, in Mason circuit court, exhibited by George H. Holzgrafe, against The Winnesheik Insurance Company, alleging a verbal contract of insurance upon a certain building of complainant, in the town of Havana, in Mason county, to the

Winnesheik Insurance Co. v. Holzgrafe.

amount of \$2,200, and the subsequent destruction of the building by fire in the life-time of the contract.

The bill prays that an account might be taken of complainant's loss; that the contract be specifically enforced, and that defendants be decreed to pay him the above amount, besides the costs of this suit.

The defendants answered the bill, denying any such contract, to which there was a general replication, and the cause proceeded to a hearing on the bill, answer, replication and proofs.

The bill alleges that a premium note, at ten per cent interest, was given for the insurance, which, it appears, complainant, after the fire, offered to pay, and tendered the money therefor.

The court decreed as prayed, after deducting the amount of the premium note. To reverse the decree, the defendants have appealed to this court.

It is alleged in the bill of complaint that complainant was solicited by Phelps & Elliott, acting as the agents of defendants, on the 1st day of December, 1866, to make an application for, and acceptance of, a policy of insurance in the defendant company, and did then and there, at said Mason county, offer, for and in behalf of the company, to insure complainant to the amount of \$2,200 upon his building, against loss or damage by fire to that amount, on condition complainant would pay the company the sum of \$111 on the 1st day of January, 1867, being at the rate of five per cent per annum on the amount insured, complainant to execute his promissory note therefor.

It is then alleged that complainant accepted the offer, and agreed to accept a policy of insurance upon his building for that sum, upon the terms above stated, and on the 4th day of December, 1866, he signed an application for a policy drawn up and presented to him by Phelps & Elliott, or one of them, as defendants' agents, and then and there delivered to these agents his promissory note for the premium agreed.

Complainant then alleges that these agents did then and there represent and declare to complainant that, in consideration of this promissory note, and the money specified therein to be paid, he should receive a good and valid policy of insurance, to take effect and be in force from the 4th day of December, the date of his application, and to continue in force for one year next thereafter.

It is further alleged that it was the usual and customary practice

Winnesheik Insurance Co. v. Holzgrafe.

of this company to issue policies upon such an application, to take effect on the day of the date of the application.

The facts proved are, that the agents of defendants solicited complainant to make application for a policy in their company for a certain sum, for a stipulated premium, and for a certain time.

Yielding to this solicitation, complainant signed a printed application, with the blanks filled up in writing, for insurance by appellants, against loss or damage by fire, in the sum of \$2,200, for the term of one year, commencing on the 4th day of December, 1866, at noon, on his frame building, and in the same instrument, after warranting the description, condition, value, etc., of the property to be as represented; that all the questions are correctly answered; that he has made no concealment of any circumstance or fact tending to increase the hazard, and which the company ought to know, and agreeing that the application shall be taken as a part of the policy, and be referred to in case of loss, and further agreeing that any misrepresentation or concealment of facts should render the insurance void, it closes in this manner: "The policy to bear date and take effect at noon of the day this application is approved," dated this 4th day of December, 1866, and signed by complainant, G. H. Holzgrafe, applicant. On the same day complainant executed this note:

"DATED AT HAVANA, Illinois, *December 4, 1866.*

"On the 1st day of January, 1867, for value received, I promise to pay the Winnesheik Insurance Company, or order, \$111.50, with interest at the rate of ten per cent per annum from date, until paid."

At the same time, the agents of appellants executed a paper of this tenor:

"Received of George H. Holzgrafe, of Havana, Illinois, application for insurance by the Winnesheik Insurance Company, of Freeport, Illinois, on property, to the amount of \$2,200, for the term of one year, and a note for cash premium, etc., due on the 1st day of January, 1867, for \$111.50, all of which are to be returned if a policy be not issued. Policy to be sent by mail. Dated at Havana, Illinois, this 4th day of December, 1866."

These were all the papers which passed between these parties.

Appellee insists upon his right to prove that, when these papers were executed, or prior thereto, appellants' agents represented to him that he would receive a valid policy of insurance from appellants, to

Winnesehek Insurance Co. v. Holzgrafe.

take effect and be in force from the date of the application and note, and to continue in force for one year next thereafter, and that it was the usual or customary practice of appellants to issue policies of insurance upon applications such as appellee had made, to bear date and take effect on the day of the date of the application, and he has so alleged in his bill of complaint.

J. M. Bailey, for appellants, as to the point that parol evidence is not admissible to alter the written contract, cited *Wilson v. Conway, Fire Ins. Co.*, 4 R. I. 141; *Honick v. Phoenix Ins. Co.*, 22 Mo. 82; *Lamatte v. Hudson River Fire Ins. Co.*, 17 N. Y. 199; *Ripley v. Aetna Fire Ins. Co.*, 30 id. 136; *Mayor, etc., of New York v. Brooklyn Ins. Co.*, 41 Barb. 231; *Farmers' Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23; *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill, 329; *Holmes v. Charlestown Mut. Ins. Co.*, 10 Metc. 211; *Hovey v. American Mut. Ins. Co.*, 2 Duer, 554; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235; *Glendale Woolen Manufacturing Co. v. Protection Ins. Co.*, 21 id. 19; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, and same case affirmed, 19 id. 628; *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. 175.

To constitute a valid contract of insurance, the minds of the parties must meet. *Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; *Thayer v. Middlesex Fire Ins. Co.*, 10 Pick. 326; *Christie v. North British Ins. Co.*, 3 Cases in Court of Sessions, 360.

As to the extent of agents' authority to bind the company. *Ins. Co. v. Johnson*, 23 Penn. St. 72; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. 527; *Wilson v. Genesee Mut. Ins. Co.*, 4 Kern. 418; *Hackney v. Alleghany Co. Mut. Ins. Co.*, 4 Penn. St. 185; *Bell v. Josselyn*, 3 Gray, 310; *Smith v. Ins. Co.*, 24 Penn. St. 320; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 id. 402; *Tate v. Citizens' Mut. Fire Ins. Co.*, 13 Gray, 79.

Lacey & Wallace, for appellee, cited *N. E. Fire Ins. Co. v. Schettler*, 38 Ill. 167; *Chicago, Burlington & Quincy R. R. Co. v. Coleman*, 18 id. 299; 1 Pars. on Cont. 73; *Perkins v. Washington Ins. Co.*, 4 Conn. 646; Angell on Fire Ins., § 452; *Taylor v. M. F. & M. Ins. Co.*, 9 How. (U. S.) 390; *Lightbody v. N. A. Ins. Co.*, 23 Wend. 18.

BREESE, C. J. (after stating the facts). The first point to be considered rises here: Taking the application of appellee, and the nota

Winnesheik Insurance Co. v. Holzgrafe.

executed by him, and the receipt given by the agents to him, as the contract of the parties, and that it was the contract is unquestionable, can it be varied, altered or extended by proof of these representations of the agents? Can it be proved by parol, the written instrument stipulating that the policy is to bear date and take effect at noon of the day the application is approved, that it was, in fact and in truth, to take effect on the day of the date of the application? Would not this vary, essentially, the terms of the written contract? And, though it might have been the usage of appellants so to issue them, that could not vary the express terms of the contract. *Ill. M. F. Ins. Co. v. O'Neile*, 13 Ill. 89. Appellee agreed with the company when he signed the application that the policy should bear date and take effect at noon of the day when the application should be approved. Approved by whom and where? Manifestly by the home office, or principal office, at Freeport, some hundreds of miles distant from Havana. It is not competent, on well-recognized principles of law, to prove, by parol, that the policy was to take effect on the day of the date of the application, for that would be making a contract by parol, wholly different from the written contract.

These writings can be regarded in no other light than as expressive of the terms and conditions of the contract, and the law conclusively presumes that all the terms of the agreement are correctly expressed in the writing, and the conversations and declarations of the parties made before or simultaneously with the writing are not admissible in evidence. *Abrams v. Pomeroy*, 13 Ill. 133, 136, 137. The rule that written agreements, unambiguous in their terms, are not to be varied or explained by parol, is so old, so well established, and so consonant with reason and justice, as to render any argument upon this point unnecessary. The rule may be regarded as inflexible. *Marshall v. Gridley*, 46 id. 250.

The application was rejected by the principal office on the twelfth of December, some twelve days before the destruction of the building by fire, and was returned to their agents by mail, without the note, on the twenty-second of December, two days before the fire. It is in proof one of these agents went to the complainant's place of business, so soon as he received notice of the rejection of the application, to inform complainant of the fact; but, finding him engaged with some customers, he refrained from so doing. Two days after, the building was consumed by fire.

Winnesheik Insurance Co. v. Holzgrafe.

As by the written agreement of complainant with the insurance company, no contract of insurance was to take effect until the day the application was approved, and, as it was not approved, it follows there was no contract of insurance; that the company had incurred no legal liability to make good this loss, and no recovery could be had against them.

But it is urged by appellee, that these verbal representations of the agents should be considered as the representations of their principal, and they establish a contract of insurance, definite in its terms, and in full force when the building was consumed.

It has been often said by this court, that a contract cannot exist partly in writing and partly in parol. *Lane v. Sharp*, 3 Scam. 573; *O'Reer v. Strong*, 13 Ill. 689; *Marshall v. Gridley*, 46 id. 250.

But it is urged, the failure of appellants to return the premium note at the time the application was returned, and the delay in returning the application justify and require the inference that the company had approved or accepted the application of complainant. But such an inference would be in the face of the testimony of the general agent, Stewart, who states that the application was submitted to him at El Paso, in the early part of December, by the special agents at that place, and was rejected by him, but, at the earnest solicitation of those agents, he took it to the office at Freeport, for the consideration of the president and secretary of the company, who immediately rejected it, and returned it to Phelps & Elliott, at Havana, on the same day, and that was the twelfth of December. Usually, delay cannot make a contract. Under some circumstances, perhaps, a proposal may become a contract by tardiness in rejecting or answering it, but no such case now occurs to us.

That appellants received this application is undoubted, and that they did not respond to it, on the instant, is likewise true. In the nature of things, considering the irregularity of the mails, and their default sometimes, and some delay, perhaps, in putting the application in the mail, a lapse of eighteen days between its receipt at Freeport and its return to Havana cannot be considered so extraordinary as to authorize an implication from it, that the application was accepted, and thereby an insurance effected.

Appellee insists there was a contract of insurance made by the lawfully authorized agents of the company. That contract must rest in parol, for it is not found in the writings we have been considering. Taking the representations and declarations of these

Winnesheik Insurance Co. v. Holzgrafe.

agents made to complainant, in connection with his written application to the company for insurance, a contract may be predicated upon them. The question then arises as to the power of these agents to make such a contract. The warrant of their authority is in the record. By that they were only authorized to receive applications for insurance in accordance with the instructions to agents, and to collect and transmit the premiums therefor. This was the extent of their authority, and no instructions have been shown from their principals authorizing them to go one step beyond this, nor is there any proof they ever did, or ever designed, to go a step beyond. They both state they never held themselves out to community as possessing authority to effect insurances, write up policies, adjust losses, or do any thing more than the letter of their appointment specified. We have said, in several cases, where an agent of an insurance company shall, with the knowledge of his principal, so hold himself out to the public by receiving applications for insurance, and granting policies, to such an extent as to induce the public doing business with him to believe he is the lawfully constituted agent, the principal, having accepted the cash premium, shall not be permitted afterward, in case of loss, to repudiate the act. Such was the case of *Aetna Ins. Co. v. Maguire*, 51 Ill. 342.

We decide this case on the ground that an application for an insurance was all that was made by complainant, and that the delay in responding to it was not of a character from which an acceptance of the proposal can be implied, and that any contract of insurance effected by the agents of appellants was not binding upon appellants, such contract not being within the scope of the authority with which they were vested by the company, and which was well known. We repeat here what was said in *Aetna Insurance Co. v. Maguire*, *supra*. That case turned upon the question of a cancellation of the policy of insurance which had been written up by the agent, and the premium transmitted to the general agent, and retained by him, and an adjuster of the loss had been sent out to examine into the loss. There, the contract was evidenced by the policy which the agent had written, and who seemed to possess all the symbols of an unrestricted agency, and had actually issued the policy then in question. Here the application for insurance was not accepted, and the agents never, at any time, represented or intimated to any one that they had any other authority than to transmit applications and receive premiums.

T. W. & W. R. R. Co. v. Baddeley.

In *Maguire's Case* we said, we desire it to be understood, in this jurisdiction at least, where an insurance company has appointed an agent, known and recognized as such, and he, by his acts, known and acquiesced in them, induces the public to believe he is vested with all the power and authority necessary for him to do the act, and nothing to the contrary is shown or pretended at the time of doing the act, public policy, the safety of the people, demand the company should be liable for such of his acts as appear on their face to be usual and proper in and about the business in which the agent is engaged.

The case here is very different. It has no ground to rest upon, the application for insurance never having been accepted by the defendant company.

The decree must be reversed.

Decree reversed.

T. W. & W. R. R. Co., appellant, v. BADDELEY.

(54 Ill. 12.)

*Railroad company — passengers — measure of damages — injuries to mind —
"extraordinary care" — leaving train at station.*

In an action against a railroad company to recover for injuries sustained by a passenger, *held* (1), that evidence of the attending physician was admissible as to what effect the injuries would have upon the future condition of plaintiff, and as to how the injuries had effected his mind, although there was no declaration that the injuries had been willful; (2), that the phrase "extraordinary care," in the charge to the jury, was equivalent to "greatest care," "utmost care," the "highest degree of care," that being the degree of care legally required in his case; and (3), that railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, they will be liable therefor.

ACTION by Baddeley against the Toledo, Wabash & Western Railway Co. The facts appear in the opinion.

A. E. Harmon and Wm. E. Nelson, for appellants.

Langley & Wolfe, for appellee.

BRESE, Ch. J. This was an action on the case, against a railroad company, to recover damages for an injury to the plaintiff, a passenger on the train, occasioned by the negligence of the company, and a verdict for plaintiff of \$10,000, one-half of which was remitted by the plaintiff, and judgment entered for \$5,000.

The defendants bring the record here, by writ of error (the judge here disposes of a matter of practice and of evidence), assigning various errors.

An objection was made by defendants on the trial, to a question to this effect, put to the attending physician of plaintiff: "Have these injuries affected the mind of the plaintiff?"

It is insisted by defendants, that, as the act was not willfully done, the mere mental suffering resulting from it forms no part of the actionable injury, citing a note in 2 Greenleaf on Ev., § 267. The authority referred to by the author of that treatise, is *Flemington v. Smithers*, 2 Car. & Payne, 292. In the text, the author says: Injuries to the person or to the reputation, consist in the pain inflicted, whether bodily or *mental*, and in the expenses and loss of property which they occasion; and the jury, in estimating damages, may consider, not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily suffering, and if the injury was willful, his mental agony also.

It will be perceived the question put has no reference to this effect upon the mind. Mental suffering, such as a person is supposed to undergo when writhing under the infliction of a willful injury, is not involved in the question. The answer of the witness shows he did not so understand it, for he says: "Yes, sir, so much so, he is almost incapacitated from doing anything at all; at this time he cannot recollect anything more than ten minutes; at times he loses his mind entirely." The effort was to show by this witness the shock to plaintiff's system by the fall, and consequent amputation of his arm, was so great as to deprive him, in a great measure, of mental power, and this was a legitimate subject of inquiry. In the opinion of this witness, the injury was permanent, and of the most serious and distressing character.

This question was followed by another, to which objection was

made. It was this: "What will be the effect of these injuries on his future condition?" The answer was: "I think it will result in death before many months; he may live one year."

Defendants insist that no man, physician or otherwise, can tell what the future condition of an injured person will be. This may be true, and this physician did not pretend to say what his future condition would certainly be, he merely expressed an opinion on the facts, on the medical knowledge he had, and of physiology. He was a physician of years' practice, and must have been quite ignorant if he could not form an opinion on the probable effect of such injuries on the human system. It may be he was mistaken, but his opinion on the subject was proper for the consideration of the jury.

All the evidence of this character objected to by defendants was admissible under the declaration, to the benefit of which the plaintiff was entitled. 1 Ch. Pl. 398; *Frink et al. v. Schroyer*, 18 Ill. 416; *Slater v. Rink*, id. 527, and many other cases to the same effect.

An objection is made to the instructions given for the plaintiff, especially the second, in which the jury are told these companies must exercise extraordinary care. It is said the court did not explain to the jury what was extraordinary care, leaving it to each juror to put his own construction on the phrase. We think this objection is rather hypercritical. Had the court used the phrase, the strictest care, or any other phrase implying a care more than ordinary, no one would think the court should give an explanation of it. So, where the phrase, extraordinary care, was used, the jury could not fail to see that something more than ordinary care was required, something extra, beyond that degree. It does not differ from the phrase, greatest care, utmost care, the highest degree of care, and so the jury would understand it.

The fourth instruction given for plaintiff is objected to. It was this:

"The jury are further instructed, that a passenger is entitled to a reasonable time to leave the car in which he has been riding, when a train is stopped for that purpose, and what will constitute a reasonable time, depends upon the age and physical condition of the passenger, as well as the time, place and facilities for getting off the train, which the jury are at liberty to consider, in determining whether or not such reasonable time has been allowed."

If the instruction was designed to be understood that the age and decrepitude of a passenger must determine the time of the stoppage of a train on its arrival at a station, it would be objectionable, but it is not to be so understood. Its extent is, that railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety; and if the time tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, the company would be liable therefor.

The eighth instruction given for the plaintiff is objected to, on the ground that the mental suffering of the plaintiff was not a proper element to enter into the consideration of the jury, the injury not having been willful.

There was no evidence before the jury of mental suffering by the plaintiff. The proof was, that his mind was almost totally destroyed, and it must have been in view of such a condition the jury received the instruction. They could not have been misled by the language in which the instruction was couched. And, as given, it was more favorable to the defendants than if the attention of the jury had been called to the fact of an entire breaking up of that most important faculty, on which human happiness so much depends.

There is no argument upon the point that the damages are excessive, and we forbear touching that subject.

Perceiving no error in the record which would justify us in reversing the judgment, the same must be affirmed.

Judgment affirmed.

Robbins v. Bunn.

ROBBINS, appellant, v. BUNN *et al.*

(54 Ill. 48.)

Government lands—pre-emption—powers of land officers—mortgage.

M. purchased government land, but B. soon entered upon it as a pre-emptor, claiming to have commenced a settlement and improvement on it previous to the purchase by M. The pre-emption claim was contested; but it was held good by the land officers, it having been appealed to the secretary of the interior. *Held*, that the decision of the land officers was conclusive as to the right of pre-emption.

A mortgage upon government land given by the pre-emptor, after an entry and certificate received, but before patent issued, is not invalid under the twelfth section of the pre-emption law of 1841, providing that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," the words "the right hereby secured" being construed to mean simply the right of pre-emption.

On the 15th of November, 1855, John P. Mitchell purchased at the government land sales a part of section twenty-seven, in township nineteen, range three, in the Danville land district, and received the usual certificate of purchase, and, at the same time, Clifton H. Moore purchased another portion of the same section, and also received his certificate of purchase. On the 2d of February, 1856, Thomas J. Bunn was allowed to enter the same land as a pre-emptor, claiming to have commenced a settlement and improvement on said land on the 8th of November, 1855. Moore and Mitchell contested the pre-emption claim of Bunn, and sought to have it set aside by the register and receiver. They, however, held it good, and Moore appealed to the commissioner of the general land office, who ordered the entry by Bunn to be canceled, and at once issued a patent to Moore. Bunn appealed to the secretary of the interior, who reversed the decision of the commissioner, decided the pre-emption claim to be valid, and ordered Moore's patent, which had been delivered, to be canceled. Moore was notified of the decision and requested to return his patent, which he refused to do.

Mitchell's title under his certificate was sold on judgment and execution against him, and passed to David Davis, one of the defendants.

On the 22d of February, 1856, a few days after his entry,

Thomas J. Bunn mortgaged the land to Louis Bunn, who subsequently assigned the note and mortgage to Robbins. Robbins has filed the present bill to foreclose, making Bunn, Moore and Davis defendants, and asking that the title of Moore and Davis should be set aside. On the hearing, the court dismissed the bill as to Moore, but held the title of Davis subject to the mortgage. Both parties appealed.

Williams & Burr, for appellant.

C. H. Moore, pro se, and for appellee Davis.

LAWRENCE, J. Counsel for complainant, without arguing the question of Bunn's right to a pre-emption, on the facts, insist that the decision of the secretary of the interior is conclusive upon that point, and upon the rights of the parties who have submitted their claims to his determination. In support of this position, they cite *McConnell v. Wilcox*, 1 Seam. 353; *Benner v. Manlove*, 3 id. 339; *Bennett v. Farrar*, 2 Gilm. 598; *Gray v. McCance*, 14 Ill. 344, and *McGhee v. Wright*, 16 id. 555.

On the other hand, counsel for defendants insist, when the government has sold a tract of land and received the money of the purchaser, he has acquired rights which the land officers cannot divest, and if the government afterward grants the legal title to another, such grantee takes it subject to the equities of the first purchaser, which it is the exclusive province of the judicial tribunals of the country to investigate and determine, without being governed by the action of the land officers. To sustain this view, the defendants' counsel cite *Rogers v. Brent*, 5 Gilm. 578; *McDowell v. Morgan*, 28 Ill. 528; *Forbes v. Hall*, 34 id. 167; *Brill v. Stiles*, 35 id. 307, and *Aldrich v. Aldrich*, 37 id. 35. To these may be added, *Baty v. Sale*, 43 id. 351.

These two classes of cases may seem, at first, inconsistent with each other, and there probably are some expressions in the various opinions not strictly harmonious, but, on further consideration, it will be seen there is no real antagonism in the decisions. The cases of the first class relate to pre-emption claims, upon which the land officers have decided. The pre-emption law of 1880 required proof of the facts upon which the right of pre-emption depended to be made to the satisfaction of the register and receiver, agree

Robbins v. Bunn.

ably to the rules to be prescribed by the commissioner of the general land office. This, by implication, gave them the right to decide all cases of contested pre-emption, so far as they depended upon the fact of prior settlement, and this construction has been uniformly given to the law, as will be seen in the cases above cited, and in other authorities quoted in the opinions pronounced in those cases. The finding of the land officers upon the facts in matters of pre-emption, has been held conclusive by the courts, upon the familiar ground, that such officers, in these proceedings, were acting in a *quasi* judicial capacity, and within the scope of their authority.

But, on the other hand, when these officers have undertaken to cancel a patent or a certificate of entry, for which a purchaser has paid his money, either at their discretion or under some pretended regulation of the department which the law did not authorize, or under some clearly erroneous construction of the laws of congress, the courts have held themselves not bound by such acts of the officers of the land department, because they were not exercising a judicial function within the limits prescribed by law. The cases cited by counsel for defendant will be found to relate to proceedings of this character.

Between these two classes of authorities, there is a clear and sound distinction. In the one, the proceedings of the land officers are held conclusive, because judicial in their character, and within their conceded jurisdiction. In the other, such proceedings are not held conclusive, because they are either ministerial in their character, or, if judicial, beyond the authority given by the acts of congress. In the case of *Baty v. Sale*, *ubi supra*, which is, perhaps, the strongest case for the defendant upon this question, the commissioner of the general land office, after having decided that the pre-emption had been properly proved, and the entry properly made, subsequently undertook to cancel the entry, on the ground that the pre-emptor had forfeited his right by failing to comply with a regulation of the department, requiring a renewal of his application after the lands had been temporarily taken out of market. The court held the department had no power to make such a regulation, and that the pre-emptor could not thus be arbitrarily divested of the rights given to him by law. This, it will be observed, was not a case of judicial investigation authorized by law, of the facts upon which the right of pre-emption depends, but an attempt, by force of an unauthorized rule of the department, to take away a

right already established. The other cases cited by defendant, are still more distinct from the opposing class, and from the case at bar.

We find it impossible to distinguish the case at bar from several of those cited by complainant. In principle, it is precisely like *Gray v. McCance* and *McGhee v. Wright*, *ubi supra*. In *Gray v. McCance*, it is true, both parties claimed under a pre-emption, but there, as here, one party had paid his money and obtained his certificate. Besides, as the power is given to the land officers to adjudicate upon the facts which give a pre-emption right, they must necessarily have that power when the right is contested by a person claiming under a private entry, as well as when both claim under pre-emptions. The act of 1841, in terms, gives the power in the last case, but the previous laws give it in both cases, by necessary implication. Indeed, in *McGhee v. Wright*, the contest was, as here, between a pre-emption claimant and a claimant under a private entry. There, as here, the latter had received his patent, and the only respect in which that case is unlike this, is that there the pre-emption claimant had received a patent of a junior date. But that had no bearing whatever upon the question of the conclusive effect of the decision by the officers of the land department.

In the case before us, the parties have submitted their claims to a tribunal authorized to pass upon them so far as the right of pre-emption depended on the fact of settlement, which is the only question raised here by defendants, it being insisted by them that Bunn was not a settler in good faith. Both parties produced their evidence before the register and receiver, and each, in turn, prosecuted an appeal to a higher tribunal. We must, under the clear current of authorities, hold the decision of that tribunal final upon the questions presented by this record.

The circuit court should have rendered a decree holding the title of all the defendants subject to complainant's mortgage. The decree must be reversed; the costs of this court to be taxed against Davis and Moore.

Decree reversed.

The following additional opinion was announced at the January term 1871, on a rehearing:

LAWRENCE, Ch. J. A rehearing having been granted in this case we have again considered it, but see no reason to doubt the sound-

Robbins v. Bunn.

ness of the conclusions announced in the former opinion filed herein. It is unnecessary to add anything to that opinion, in regard to the questions which it discusses. We will, however, state our conclusions upon another point not pressed in the first argument, nor considered by the court, but upon which stress is laid in the petition for rehearing, and in the second argument.

It is urged by counsel for appellee, that as the mortgage was made by the pre-emptor before the patent was issued, it was void, and Robbins took nothing by the assignment. This position is founded on the twelfth section of the pre-emption law of 1841, which reads as follows:

"And be it further enacted, That prior to any entries being made, under and by virtue of the provisions of this act, proof of the settlement and improvement thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeable to such rules as shall be prescribed by the secretary of the treasury, who shall each be entitled to receive fifty cents from each applicant for their services to be rendered as aforesaid; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

It is insisted that under the last clause in the foregoing section, the mortgage is void.

In order to arrive at a satisfactory conclusion, as to the meaning to be given to this section, it must be considered in connection with the next or thirteenth section of the same act. That provides that, before any person claiming the benefit of the act, shall be allowed to enter the land occupied by him, he shall make an affidavit before the register or receiver, stating certain facts, one of which is, that he has not made a contract with any person, by which the title to be acquired by him from the government will inure, in whole or in part, to the benefit of any person except himself. The section further provides, if he swears falsely in the premises, he shall forfeit the money which he may have paid for the land, and his right and title to the land, and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be void.

We think it evident, from these two sections considered together, that the government was seeking to protect itself against claims under settlements not made in good faith for the purpose of occu-

pancy by the settler himself, but made with a view of securing the title of desirable lands for speculators. In order to accomplish this, the twelfth section makes null and void all assignments "of the right hereby secured" before the patent issues. What is "the right hereby secured," referred to in this phrase? It is simply the right of pre-emption; the right to purchase the land at the government price, in preference to any other person, and before it is offered at public sale. Any transfer of that right is forbidden, and any contract made before the purchase from the government is completed, by which the settler should agree to convey his title, when acquired, to another, would be void. While the twelfth section refers simply to the right of pre-emption existing in the settler before the pre-emption or purchase is actually made, and applies to such right the appropriate words "transfer" and "assignment," the thirteenth section, in declaring the penalty for a false affidavit, provides for a forfeiture both of the money and of the title to the land, unless it has passed into the hands of an innocent purchaser. The conveyance which is pronounced void in this section in case of perjury, and if not made to an innocent purchaser, is not a transfer of the right of pre-emption referred to in the twelfth section, but a conveyance of the title acquired by the purchase, and hence the use of the appropriate words "grant" and "conveyance." Hence, too, the exception in favor of innocent purchasers. A person buying after the land has been entered, whether before or after the patent is issued, would be an innocent purchaser if buying without knowledge that the affidavit was false, and hence his rights are saved. But there is no saving clause for innocent purchasers in the twelfth section, because in the transfer of the mere right of pre-emption, before the land is entered, there can be no innocent purchaser. The purchaser buying only a right of pre-emption, would be chargeable with knowledge that he bought in violation of the law.

The error in the argument of counsel for appellee lies in the assumption that the right, the transfer of which is pronounced void by the twelfth section, refers not only to the right of pre-emption, but also to the title acquired by the actual purchase of the land, the payment of the money therefor, and the receipt of a certificate of entry. The only ground for such a construction is the use of the phrase, "prior to the issuing of the patent," in the clause forbidding the assignment of the right. It is certainly an inaccuracy

Robbins v. Bunn.

to speak of the right of pre-emption as existing until the issuance of the patent, when the right has been exercised, and the person possessing it has made his proof, paid his money and received a certificate of purchase which would entitle him, by its express terms, to a patent, as soon as it should be presented to the commissioner of the general land office. Evidently the phrase was carelessly used, and must be construed as referring, not to the date of the actual issue of the patent, but to the time when the right to it actually accrues, that is, the time when the land is purchased. The words in the act are, in fact, surplusage, for any attempted assignment of the right of pre-emption would necessarily be prior to the issuing of the patent, and also prior to the entry of the land.

That we are not mistaken in our understanding of what is meant by the right, the transfer of which is prohibited, is shown by recurring to the previous legislation of congress. In the third section of the pre-emption act of 1830, we find the following words: "All assignments and transfers of the right of pre-emption given by this act prior to the issuance of patents, shall be null and void." Here the right, which is not to be transferred, is expressly defined. It is the right of pre-emption. This act, by its terms, was to remain in force but one year, and in 1832, after the act had expired, another act was passed containing but one section, which merely provided that certificates of purchase, issued under the act of 1830, might be assigned, and patents be issued in the name of the assignee. This act was doubtless passed to remove any doubts which might arise under the first act, and shows clearly that it was not the policy of congress to prohibit the transfer of certificates of purchase. These different acts will be found in the appendix to the second volume of Purple's Statutes.

It is incomprehensible that congress should have intended to prohibit the sale of lands by purchasers from the government until they had received their patents. Such a prohibition would have been not only grossly unjust, but, so far as we can see, without object. When government, by its officers, was duly satisfied of the right of pre-emption, and had, in the mode pointed out by law, made sale of a tract of land and received the purchase-money, it held the legal title only as trustee, and the purchaser was entitled to it as soon as the patent could be issued. But considerable delays would frequently and probably generally occur in the issuing of patents, and to prevent the owner of land, for which he had fully

paid, from selling it until the patent should be received, would be to the last degree unreasonable. If it were conceded that the government could impose such a condition upon purchasers, and that it designed to do so, it should be construed merely as a condition, of which the government alone could take advantage. But we have no idea the government intended to impose such a condition. As a matter of fact, certificates of entry have always been considered assignable in this State, and by the fourth section of the chapter of evidence, they have been made evidence of legal title, on which recovery could be had in ejectment, either by the person making the entry, his heirs or assigns, unless a paramount title is shown.

We are of opinion, the mortgage in this case, being made after Bunn entered the land and received his certificate, was not void under the act of congress.

We are also of opinion, the defendants were not entitled to have the taxes paid by them made a prior lien to the mortgage.

The other points made on the reargument fall within the principles announced in the former opinion. They relate to the right of pre-emption litigated before another tribunal.

Decree reversed.

 Illinois Central Railroad Company v. McClellan.

ILLINOIS CENTRAL RAILROAD COMPANY, appellant, v. McCLELLAN.

(54 Ill. 58.)

Common carrier—"perishable" property—delay in transportation—military possession—measure of damages.

In an action against defendants, as common carriers, to recover damages occasioned by an alleged neglect of duty in failing to deliver a number of car loads of corn at Cairo, Ill., within a reasonable time after receiving it for transportation, whereby it became heated and of little value, *held* (1), that defendants were not discharged from liability under a clause in the receipt releasing them from loss on "perishable property," corn not being such in the commercial sense; (2), that it was no defense that the military authorities of the United States had ordered defendants to give a preference to the property of the government in transportation, where they failed to show any interference on the part of army officers which prevented them from sending this corn forward in the usual time; (3), that it was no defense that the track at Cairo was obstructed with cars filled with rejected government corn, where the evidence showed, that, immediately after the rejection of such corn, the government officers ceased to control it, and it relapsed into the hands of defendants, who could have unloaded it in a day or two; and (4), that if the corn was shipped under a special contract, the contract price should be taken as the basis for estimating the damages; otherwise the market price at Cairo at the time the corn ought to have arrived, must govern.

Action by McClellan against the Illinois Central Railroad Company. The facts appear in the opinion. The verdict and judgment in the court below were for plaintiff. The appeal is by defendants.

Williams & Burr, George Trumbell and Charles Emerson, for appellants, argued that the company had been prevented by causes beyond their control from fulfilling the contract to carry immediately, and cited *Pierce on Railways*, p. 411; 19 Barb. 36; 2 Kern. 245; *Clark v. Barnwell*, 12 How. 279; 14 Wend. 215; 12 Barb. 321; 18 Ill. 489; *Edw. on Bailments*, 520, 523, 524, 526; *Conger v. Hudson River R. R. Co.* 6 Duer, 375. The bill of lading exempted the company from responsibility for loss to "perishable property," occasioned by delays of any sort.

Lincoln, Smith & Warnock, with whom was *W. H. Hanna*, for appellee, cited *Place v. Union Express Co.* 2 Hilton, 27; *Dorr v. The N. J. S. Nav. Co.* 1 Kern. 492; *N. J. S. Nav. Co. v. Mer. Bank*, 6 How. U. S. 384; *Brehme v. Adams Express Co.* 25 Md.

Illinois Central Railroad Company v. McClellan.

R. 335; *Illinois Central Railroad Co. v. Morrison*, 19 Ill. 140; *Illinois Central Railroad Co. v. Smyser*, 38 id. 361; *Graham v. Davis*, 4 Ohio St. R. 374; *Davidson v. Graham*, 2 id. 131; *Welsh v. Railroad Co.* 10 id. 75; 1 Greenlf. Ev., § 305; *Higgins v. The U. S. Mail Steamship Co.* 3 Blachf. C. C. R. 283; 1 Greenlf. Ev. 305; *Wolfe v. Myers*, 3 Sandf. 7; *Meyer v. Peck*, 28 N. Y. 590; Broom's Legal Maxims, 414, 415; *Aspdin v. Austin*, 5 Ad. & EL N. S. 684; *Hare v. Horton*, 5 B. & Ad. 715; *Cooper v. Walker*, 4 B. & C. 49; Angell on Car., § 283; *Hand v. Baynes*, 4 Whart. 218; *Raphael v. Pickford*, 6 Scott N. R. 484; *Bennett v. Byram*, 38 Miss. 21; *Insurance Co. v. Wright*, 1 Wallace, 456; *Oelricks v. Ford*, 23 How. U. S. 49; *Webster v. Paul*, 10 Ohio St. R. 534; *Western Tr. Co. v. Newhall*, 24 Ill. 468; *Michigan Central Railroad Co. v. Hale*, 6 Mich. 256; *Dermott v. Jones*, 2 Wallace, 7; *School Trustees of Trenton v. Bennett*, 3 Dutcher, 518; *Adams v. Nichols*, 19 Pick. 276; *Bullock v. Dommitt*, 6 Term R. 650; *Brecknock Co. v. Pritchard*, id. 752; *Beebe v. Johnson*, 19 Wend. 502; *Beale v. Thompson*, 3 Bos. & Pull. 420; *Paradise v. Jane*, Aleyn's Sel. Cas. 27; *Harmony v. Bingham*, 2 Kern. 115.

WALKER, J. This was an action on the case, against appellants, as common carriers, alleging a neglect of duty in failing to deliver a number of car loads of corn at Cairo within a reasonable time after receiving it for transportation, whereby it became heated and of little or no value. It appears that appellee sold to Cobb, Christy & Co. and Cobb, Blaisdale & Co., who had contracted to the government, through Fallis, their agent, two lots of corn of 10,000 bushels each. The sale was made some time in January, 1865, 10,000 bushels to be delivered on the cars by the twentieth of February, and the balance by the first of March of that year. The lot last to be delivered was at the price of \$1.07 per bushel. The first lot was delivered within the specified time, and some 3,000 bushels of the last lot. Afterward, the time was extended for the delivery of the remainder until the 10th of April, 1865. When placed on the cars and receipts taken, the corn was to be paid for by the purchasers, on the delivery of the receipts to Fallis, but appellee was to stand the government inspection at Cairo. The corn which was put on the cars after the first of March and before the tenth of April, in fulfillment of the agreement, is the subject of this controversy, as well as corn shipped in May.

Illinois Central Railroad Company v. McClellan.

Appellee seems to have had the amount of grain necessary to fill this contract, and had it placed on the cars of appellants before the 10th day of April, 1865. He, at the time, took receipts or freight bills from the company, specifying the amount each car contained; that Gildersleve shipped the larger portion at Hudson, and the remainder at El Paso; that the corn was then sound and in good condition. At the time of the various shipments the employes of the company gave regular shipping receipts. These all seem to have been given prior to the ninth day of April, but four other cars were loaded on the sixteenth and seventeenth days of May, which, so far as we have been able to discover, constituted a separate transaction; but it seems, from the evidence, like the other, to have become worthless by delay in its delivery, or at least a portion of it. The evidence shows that no portion of the first cars arrived in Cairo in less than eleven days, and the last of it as much as forty-five days. It appears, from the evidence, that the usual time required to run freight from the points where this corn was shipped to its destination, was from two and a half to three days.

A large portion of the corn thus shipped, when it arrived in Cairo, was spoiled from heating, and was sold in its damaged condition, and netted but seven cents per bushel.

The jury have found that the damage sustained by appellee grew out of the failure of appellants to deliver the corn at Cairo within a reasonable time; and a careful examination of the evidence clearly shows, that had the corn been transported in the usual time it could not have heated before its arrival at Cairo, and that it was customary for the government officer to inspect such grain within twenty-four hours after its arrival. It is, therefore, clear, that, had this grain been transported in the usual time, appellee would not have sustained any loss; and inasmuch as appellants are common carriers, subject to all liabilities and burdens incident to that business, they must be held responsible for all losses sustained by reason of any neglect of duty on their part, unless they have limited their liability by special agreement, or they have shown such a state of facts as the law holds an excuse for failing to deliver this grain within a reasonable time. No principle of law is better recognized or more firmly established than that a common carrier is bound, in the transportation of goods, to deliver within a reasonable time; and a failure to do so renders them liable for all proximate damages which may ensue.

Illinois Central Railroad Company v. McClellan.

The receipt given by the company for this grain contains a number of conditions, none of which, however, can apply to this character of property. If it were contended that it falls within the clause which releases them from loss on perishable property, it cannot be allowed, as grain cannot be held to be of that nature. All know, that, with reasonable care, corn can be preserved for many years. In one sense, nearly all things are perishable, as grain, vegetables, timber, animals, and even many kinds of metal perish, or cease to retain their usual character. Perishable property, in the commercial sense, is that which, from its nature, decays in a short space of time, without reference to the care it receives. Of that character are many varieties of fruits, flowers, some kinds of liquors, and numerous vegetable productions. But to say mature, merchantable corn was of that character, would be a perversion of language. This clause does not, therefore, govern the loss in this case.

It is, however, insisted that the general government had military possession of the road, and that the company cannot be held liable for the delay and the injury resulting therefrom. Appellants, to prove the defense, read in evidence an order from the war department, which declares, that, by virtue of the authority conferred by act of congress, the president takes military possession of all railroads in the United States, from and after the 23rd of May, 1862, the date of the order, and directs the respective railroad companies, their officers and servants, to hold themselves in readiness for the transportation of troops and munitions of war, as may be ordered by the military authorities, to the exclusion of all other business.

On the 24th of December, 1863, Major-General Grant, in command of the army of the Mississippi, issued an order defining the regulations to be observed by railroads. It orders that the quartermaster's department shall have control of military railroads so far as relates to the transmission of military freight and military passengers, with power to exclude such other freight and passengers as may be deemed necessary.

The chief quartermaster, Allin, on the 11th of January, 1864, addressed an order to Colonel Myers, chief quartermaster at St. Louis, in which he states that, owing to the obstruction to river navigation, the full force of all railroads leading from the source of supply, is required, and names the Illinois Central as one of those

Illinois Central Railroad Company v. McClellan.

roads, and directs that whatever government freight he might have at any point for shipment over that road, must be carried to the exclusion of all private property, if necessary; that whatever supplies the government may have contracted for, or might thereafter contract for, should take precedence of private freight. He also directs that requisition be made upon the agents of the Illinois Central railroad to the full extent of their capacity, if necessary, for transportation. Appellants also read in evidence a large number of orders from the military authorities, specially directing shipments of corn, oats and hay, running through the two last years of the war, some immediately before, and others immediately after the receipts were given for the corn in controversy.

Arthur, the general superintendent of the road, testified that, in shipping freight, the agents of the road obeyed military orders; that the military authorities took charge of the cars on their arrival at Cairo, and had them unloaded, and would not permit the company to discharge the freight; that in doing so, the track at Cairo became blocked to such an extent that cars could not be run into the city. He states that appellee and Fallis came to him in the latter part of March, or 1st of April, 1865, to procure transportation for this grain; that having orders from the military authorities to ship for Cobb, Blaisdale & Co., and O. P. Cobb, Christy & Co., he stated that he would furnish cars if they should be promptly at Cairo to attend to unloading them; that the cars were so furnished.

Forsythe, the general freight agent of the road, testified that he acted under the orders of the quartermaster's department, and did not look to the directors of the road for orders in shipping freight; that but few cars went through to Cairo, except upon military orders; that the government was not able to unload the cars at Cairo, and freight accumulated at that point and along the entire length of the road; that government could not unload them as fast as the company could deliver them at Cairo; that government took about sixty cars a day during the month of April, and about forty-five to fifty per day during the month of May, 1865; that the company could have sent in from 250 to 300 cars per day, and have unloaded 200 to 250 per day had the government not interfered; that the side tracks at Cairo would hold from 250 to 300 cars, and there were, at that time, about 800 along the line of the road. He states that he might have started

Illinois Central Railroad Company v. McClellan.

these cars, but would perhaps have to stop them at Decatur, as he could not get into Cairo on account of its being blocked with cars.

He states that when corn was rejected, it was not unloaded by the government, but was cared for by the owner or consignee, or sold by the company to pay freights; that a large portion, perhaps one-half the corn which came to Cairo that spring, was rejected on its inspection.

Johnson, the freight agent at Cairo, stated that all the grain which passed inspection was taken charge of by the government, and was unloaded by the quartermaster. But all that was rejected was thrown back on other parties; that a large portion of the rejected corn had to be taken care of by the company, because the consignees refused to receive it, and that it was then their duty to take care of it to secure the charges for freight. He thinks there was a time when fifty per cent of what was brought to Cairo was rejected, but is unable to say what was the proportion in April and May of that year. He, as well as both the other witnesses, say that the corn was generally inspected within twenty-four hours after its arrival in Cairo, and this witness says that it was from five days to two weeks after inspection before the rejected corn was brought around on the track to be unloaded. He says their warehouses were full, and the difficulty in disposing of this grain arose from a want of room for its storage; that a portion of this rejected corn was placed on wharf-boats, and a part on steamboats, but they were not sufficient to hold the rejected corn, and boats were at that time scarce.

Do these facts establish the defense which has been interposed? Common carriers are held to the highest degree of diligence. It is only the acts of God or the public enemy that excuse the non-delivery of goods intrusted to their care for transportation. But while this is true of the delivery, their duty in respect to the preservation of the property from deterioration is not of so high a character. A common carrier is not liable for losses from ordinary wear and tear of goods in the course of transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from inherent natural infirmity and tendency to damage, or which arise from the personal neglect or wrong, or misconduct of the owner or shipper of the goods. Story on Bailment, § 492 A. But the common carrier is bound to observe due care and diligence for the preservation of the goods from damage and

Illinois Central Railroad Company v. McClellan.

deterioration. Angell on Carriers, 214. While they are insurers for the delivery of the goods bailed, they are not insurers that they shall reach their destination in the same condition in which they were shipped. They are, however, bound to use due care and diligence for the preservation of the property thus intrusted to their care. If the care which prudent men would ordinarily take of their own property be omitted, and loss ensue, then the common carrier must be held liable.

It is also true that a common carrier must deliver goods without unreasonable delay; and if damages be sustained by reason of a neglect to transport goods thus received in the ordinary time, unless excused by uncontrollable circumstances, the carrier must respond in damages for the loss. Having possessed himself of the goods to be transported, he must act in good faith and perform the duty within a reasonable time, or be held liable for loss which ensues.

In this case, there was unusual and great delay, and that being shown, it devolves upon appellants to excuse or justify their conduct, or they must be held liable for the damages resulting from that delay. While they have shown that the military authorities gave orders or permission to ship military stores or grain and forage designed for the use of the army, they fail to show any interference on the part of army officers which prevented the company from sending this grain forward in the usual time. No order was given, after it was received, forbidding its shipment. On the contrary, Arthur testifies that he had orders to ship grain for Cobb, Blaisdale & Co. and Cobb, Christy & Co., and had agreed with their agent, Fallis, and appellee, to furnish transportation for this grain, which he did, when it was received by the company. So far, then, from the company being prevented by the military authorities from transporting this grain, they had express permission for the purpose. The road was still operated by the employes of the company, and they gave no notice that the road was under the control of the officers of the army, nor did they stipulate in the bill of lading that any act of the military authorities should relieve them from their duty of common carriers. Hence we see no force in the position assumed, that the road was under military authority, and they were prevented from sending the grain forward in the ordinary time required for such purpose.

Much stress is, however, laid on the fact that the track was obstructed at Cairo with cars filled with rejected corn. The evi

Illinois Central Railroad Company v. McClellan.

dence shows, that, as soon as the inspector rejected corn, the government officers ceased to have any further control of it, or the cars in which it was loaded. It then went into the hands of the company, and the evidence shows that the company could have unloaded 250 cars each day. If so, then we perceive no reason why the cars containing rejected corn could not have been unloaded, and the blocking up of the track relieved, and the freight on the road run in, at farthest, in but a few days. The evidence shows, there were but about 300 cars on the track at Cairo, and that all grain was inspected within twenty-four hours after its arrival. Then the company, by unloading the rejected corn at the rate of 200 cars per day, could have removed, if half of those at Cairo contained rejected corn, in one day, the cars from the track, and thus permitted cars along the line of the road to have gone forward, and in a few days, at most, all the grain could have been taken to Cairo.

It is, however, urged, that the military authorities would not permit the employes of the company to unload the grain which had passed inspection. We do not perceive in what respect that could prevent the company from unloading the rejected corn. But it is urged that the warehouses and other available room of the company were full, and there was no place within which to store this damaged corn, except by permitting it to remain on the track in the cars. We do not conceive this to be an answer.

The company had not stipulated, in their bills of lading, against such a contingency, even if they could have thus escaped liability. It would seem that the object of retaining the damaged corn was to obtain their freights from its sale; and even if it could not be stored, they should have submitted to the loss by throwing it away, rather than impose it upon appellee, whose grain they had undertaken to deliver without unreasonable delay. Their interest, or mere convenience, in nowise excused them from the delivery of appellee's corn. Had the damaged corn on the track been thrown out and abandoned, the track would thus, no doubt, have been free from obstruction, and the produce on the line of the road could have gone forward, and this grain would not have spoiled.

Having received this grain for transportation, without stipulations for any contingencies, and being in nowise under the *vis major*, we can but hold that appellants have failed to relieve themselves from their liabilities as common carriers. If entirely under

Illinois Central Railroad Company v. McClellan.

military control, why was this grain received? It was received and receipted for in the usual course of their business, and by "doing they held themselves out to the world as common carriers; and having done so, they must be held to the liability which that relation imposes. Had they not intended to assume such responsibility, they should have refused to receive the grain, or limited their liability by their bills of lading.

The road still retained its character of a common carrier. The military authorities only required the company to give a preference, in transporting property, to that designed for the use of government, and this grain was intended for that purpose. Cobb, Blaisdale & Co. and Cobb, Christy & Co. were large government contractors for the supply of forage, and had purchased this corn for the use of the army, and appellants were not restrained by the general military orders from its transportation, but, on the contrary, were expressly permitted to deliver it in Cairo. The jury have found that the fault of appellants alone prevented its proper delivery.

The instructions given for appellants were all they had any right to ask. They stated the law, perhaps, more favorably than could be sustained by the authority of adjudged cases. Of these instructions, therefore, they have no right to complain. Nor do we perceive any objections to the instructions given for appellee. In any view which we have been able to take of this case, we are unable to see that appellants are not liable.

But there were three car loads of corn shipped on the sixteenth and seventeenth of May, more than a month after the time expired within which appellee had the right, under the agreement, to ship to Cobb, Blaisdale & Co. Whether it was in fulfillment of that contract does not appear. If it was not, and Cobb, Blaisdale & Co. were not bound to receive it, then the price they were to pay appellee could not control in assessing damages. In that event, the market price at Cairo, at the time the grain should have reached there, would form the basis for estimating the damages. It does not follow that because Cobb, Blaisdale & Co. were to pay \$1.07 per bushel for corn shipped before the tenth of April, that they were to pay the same price for corn shipped more than a month later, after the time had expired for appellee to fill his contract, or that sum was the market price at Cairo.

The evidence fails to show whether these three car loads of corn

Illinois Central Railroad Company v. Frankenberg.

were delivered under the contract, or on some other account. Had it appeared that Cobb, Blaisdale & Co. had extended the time until the corn was placed on the track, then the assessment was right. But there is no evidence from which this can be inferred. If shipped on some other account, then the market price in Cairo, or the contract price under which it was shipped, if one existed, must govern. For the want of evidence to show the value of these three car loads of corn, the assessment was wrong, and is unsupported by the evidence, and the court below erred in refusing to set the verdict aside, and in not granting a new trial; and the judgment must be reversed and the cause remanded.

Judgment reversed.

ILLINOIS CENTRAL RAILROAD COMPANY appellants, v. FRANKENBERG et al.

(54 Ill. 33.)

Common carrier — special contract — liability beyond line — receipt.

Where a railroad company, as common carrier receives goods marked for transportation beyond its line, it assumes the common-law liability for loss or damage, whether occurring on its own or another line; but a receipt specifying that it will not be liable for any loss unless occurring on its own line, will be construed as a special contract, limiting its liability to its own line, if it is found, by a jury, that the consignors understood the terms of the receipt and assented to them. Lawrence, McAllister and Thornton, dissented.

ACTION of assumpsit by E. G. and A. W. Frankenberg against the Illinois Central Railroad Company, to recover the value of a quantity of cabbage shipped upon defendant railroad at Bloomington, Ill., for Columbus, Ohio, the latter place being a point beyond defendant's line and upon the line of the Terre Haute and Alton Railroad Company. On receipt of the cabbage, defendant company gave a bill of lading or receipt containing the following condition (among others):

"And it is further especially understood, that for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may actu

 Illinois Central Railroad Company v. Frankenberg.

ally be at the time of the happening thereof, it being understood that the said Illinois Railroad Company assume no other responsibility for their safety or safe carriage than may be incurred on its own road."

The freight was prepaid to Pana, Ill., and guaranteed from there to Columbus, Ohio. Defendant company delivered the cabbage in good condition to the Terre Haute and Alton Railroad Company at Pana, and took a receipt therefor. After leaving Pana, the cabbage was delayed and was found to be spoiled on reaching Columbus. Judgment for plaintiff; and appeal by defendants.

Williams & Burr, for appellants, argued:

I. That the acceptance of goods marked for transportation beyond the line of the receiving company, does not imply a contract to deliver at the place so marked, and cited *Van Santvoord v. St. John*, 6 Hill, 157; *Farmers' and Merchants' Bank v. Champlain Transportation Co.* 18 Vt. 131; same case, 23 Vt. 186; also, 16 Vt. 52; *Hood v. New York & New Haven R. R.* 22 Conn. 1; *Elmore v. Naugatuck R. R. Co.* 23 Conn. 457; *Naugatuck R. R. Co. v. Waterbury Button Co.* 24 Conn. 468.

II. That the clause in the bill of lading modifying the liability, should prevent this recovery, and cited *Ill. Cent. R. R. Co. v. Read*, 37 Ill. 484; *York Co. v. Ill. Cent. R. R. Co.* 3 Wall. 107.

Hughes & McCarb, for appellees, argued:

I. That the rule in *Muschamp's case*, 8 M. & W. 421, should govern as to the liability of the carrier beyond this line.

II. That nothing but a formal special contract would excuse from that liability, and cited *Western Trans. Co. v. Newhall*, 24 Ill. 466; *Davidson v. Graham*, 2 Ohio St. R. 131; *Graham & Co. v. Davidson*, 4 Ohio St. R. 362; Angell on Carriers, ed. of 1868, §§ 238, 239; *Welsh v. Pittsburgh & Fort Wayne R. R. Co.* 10 Ohio St. R. 65; *Jones v. Voorhees*, 10 Ohio, 145; the cases in *Wendell*, 19 and 21, and Angell, §§ 240 to 243; *Gould v. Hill*, 2 Hill (N. Y.) 623; *Fish v. Chapman*, 2 Kelly, 349; *Bennett v. Dutton*, 10 N. H. 487; *Bean v. Green*, 12 Maine, 422; *Beckman v. Shouse*, 5 Rawle, 189; *Eagle v. White*, 6 Wharton (Pa.) 519; *Weed v. Schenectady & Saratoga R. R. Co.* 19 Wend. 534; *Wilcox v. Parmelee*, 3 Sandf. 610; *Chouteau v. Leech*, 18 Pa. St. R. 224; *Noyes v. Rutland R. R. Co.* 27 Vt. 110; *Dorr et al. v. N. J. St. Nav. Co.* 1 Kernan, 11 N. Y. 485; *Teall v. Sears*, 9 Barb. 317; *Ill. Cent. R. R. Co. v. Copeland*, 24

Illinois Central Railroad Company v. Frankenberg.

Ill. 332; *Ill. Cent. R. R. Co. v. Johnson*, 34 Ill. 389; Angell on Carriers (ed. 1868), §§ 244 to 250, and note.

BRESEE, Ch. J. The question presented by this record is one of great importance to the public, and to the railroad interests of the country, and has received our most careful consideration.

It is a question on which the courts of this country are not in harmony with themselves, nor with those of England, to whose decisions we are accustomed to refer as evidence of what the common-law is, on any subject which has engaged their deliberations.

The question is, as to the extent of the liability of a railroad company as common carriers of goods and property.

While there is no difficulty in defining, in general terms, when the liability of a common carrier begins, the courts of this country are not agreed as to the point when it terminates.

A common carrier is defined to be one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place. Railway companies are under obligations to receive and transport all goods which may be offered to them for such purpose, and without delay. They cannot lie by, as the wagoners in early times were accustomed to do, for a rise in the price of freights. They are regarded by all courts as common carriers, resting under a duty to transport such articles as may be delivered to them in the course of their business, and their liability commences when the goods are delivered to their agent authorized to receive them. They may demand the freight money in advance, and if not paid, may refuse to carry the goods, but when they are received, they are at the risk of the carrier, and from which time he is regarded as an insurer, and held to the most stringent responsibilities, from which he can only be relieved by the operation of one of two causes, the act of God or the public enemy. Public policy has always demanded this rule, inasmuch as the goods are entirely in the power of the carrier, and it being so easy for him to conceal his fraud or misconduct, and so difficult for the owner to prove it, that the law does not permit the inquiry, but supplies the want of proof by a conclusive presumption. *Porter v. Chicago and Rock Island R. R. Co.* 20 Ill. 407; *Baldwin v. American Express Co.* 23 id. 197.

The liability of the carrier commencing with the receipt of the goods, it necessarily continues until they are delivered by him at

Illinois Central Railroad Company v. Frankenberg.

their place of destination, where the owner or consignee is bound to be present and receive them and pay the freight for them, if not previously paid. If he be not present to receive the goods, they can be placed in a safe and sufficient warehouse, when the liability of the carrier ceases and that of warehouseman begins.

The important question now arises, is he thus bound to carry and deliver to a point or place not on his route?

This is a question not settled by the courts of this country, though the received doctrine may be said to be, that the carrier is not responsible beyond his own route, except upon his special undertaking so to be liable.

By the law of common carriers, their liability was fixed on the receipt of the goods to be carried. They are insurers of the goods, and if not delivered at their place of destination, they are accountable for them, and when called upon to account for them, the *onus* of proof is upon them and they are chargeable with their value, unless the loss was caused by a force superior to human agency, which no foresight could have guarded against, or by the public enemy.

This is the extent of the liability of common carriers by the common-law. The receipt of goods by them is all that is necessary to fix this liability, so that, if a parcel or package be delivered to a railroad at Chicago, marked for Louisville, Kentucky, or any other place off their route, and they receive it to carry, they are bound, by this rule of the common-law, if the parcel or package be lost, to account to the owner for its value. The contract of the shipper is with the carrier in whose custody he placed the goods.

A responsibility so vast being cast upon carriers by the common-law, it soon became a question how they could remove or lessen it. A resort was had to a general notice, which was held by this court and other courts to be insufficient. *Western Transportation Co. v. Newhall*, 24 Ill. 466. But it was held by this court, in the case of the *Illinois Central R. R. Co. v. Morrison et al.* 19 id. 136, that such carriers may relieve themselves from their general liability by special contract. In that case, Morrison, by his writing, under seal, in consideration of a reduction of the freight charges upon a lot of cattle, assumed the risk of transportation, and released the company from all claims which might arise from damage or injury to the stock while in the cars, or for delay in its carriage, or for escape from the cars, and, generally, from all claims

Illinois Central Railroad Company v. Frankenberg.

except such as might arise from the gross negligence or default of the agents or officers of the company.

We have examined all the cases cited upon both sides of this question, and pondered them, anxiously desiring to recognize a rule which, while it shall not perplex and injure the commercial interests of the country, shall, at the same time, protect the carrier's interest, or, at least, be of so much service to it that the proprietors of that interest may know and understand the full extent of their obligations to the public.

So long ago as 1860, this court, in the case of this same company against Copeland, 24 Ill. 332, expressed a decided partiality for the rule in *Muschamp's case*, 8 Mees. & Wels. 421, so much relied on by the appellee, and in which case all the authorities, English and American, were fully examined, and we said, though this point was not in the case, we were inclined to yield to the force of the reasoning of the English courts, on principles of public convenience, if no other, and to hold, when a carrier receives goods to carry, marked to a particular place, he is *prima facie* bound to carry to, and deliver at that place. By accepting the goods so marked, he impliedly agrees so to do, and he ought to be answerable for the loss.

Again, in the case of the same company against Johnson, 34 id. 389, there was an express understanding to transport the goods to Wheeling; but the court, referring to Copeland's case, *supra*, considered that case as holding that a carrier who receives goods to carry, marked to a particular place, was bound to carry to, and deliver at that place; that it was an agreement implied from the mark or direction on the goods, and accepting them so marked, that the liability arose.

Now, on the point of public convenience, which consideration had great weight with us in determining which rule should be adopted, it seems to us that consignors of the productions of our country, or other property, by railroad, should not be required, in case of loss or damage, to look for remuneration to any other party than the one to which they delivered the goods. It would be a great hardship, indeed, to compel the consignor of a few barrels of flour, delivered to a railroad in this State, marked to New York city, and which are lost in the transit, to go to New York, or to the intermediate lines of road, and spend days and weeks, perhaps, in endeavors to find out on what particular road the loss happened,

Illinois Central Railroad Company v. Frankenberg.

and, having ascertained it, in the event of a refusal to adjust the loss, to bring a suit in the court of New York for his damages. Far more just would it be to hold the company who received the goods in the first instance, as the responsible party, and the intermediate roads its agents to carry and deliver; and it is the most reasonable and just, for all railroads have facilities, not possessed by a consignor, of tracing losses of property conveyed by them, and all have, or can have, running connections with each other. Above all, when it is considered the receiving company can, at the outset, relieve itself from its common-law liability by a special and definite agreement, such a rule cannot prejudice them. The rule being known, all parties can readily accommodate their business to it, and no inconvenience can result to any one from its operation.

In the case of the *Illinois Central R. R. Co. v. Morrison*, 19 Ill. 136, there was a formal stipulation under hand and seal, by which the consignor, for a valuable consideration, agreed to release the company from their common-law liability as carriers.

In *Adams Express Co. v. Haynes*, 42 id. 98, it was said, if a shipper takes a receipt for his goods from the company, with a full knowledge of its terms and conditions, intending to assent to the restrictions contained in it, then it becomes his contract as fully as if he had signed it.

By such a contract, the rights and duties of the parties to it must be governed; and if the stipulations in it go to limit the common-law liability, and they plainly appear in the instrument, and are not covertly inserted in it, and are understood by the consignor, then it must be enforced as any other contract of parties made in good faith.

Testing this case by these considerations, the receipt or bill of lading executed by appellants and accepted by the consignors, reciting, as it does, that the goods in question were consigned to Pana, and charges paid to that point, and that appellants should not be liable for loss or damage save on their own road, amounts to a special contract, relieving the company from their common-law duty.

It is a question for the jury to determine, whether the terms of the receipt were understood by the consignors and assented to by them. If they were, they are bound by them.

The fact that the charges were guaranteed from Pana, was not for the benefit of appellants, but for the benefit of the connecting

Hubbard v. Bell.

road, whose usage was to decline the receipt of perishable articles, as these were, unless the charges were guaranteed.

We think justice would be promoted by sending this cause back for trial, in the light of the views here presented, and of the rule we think necessary to be established for the government of all such transactions, and for that purpose reverse the judgment and remand the cause.

LAWRENCE, McALISTER and THORNTON dissented from this opinion.

Judgment reversed.

NOTE.—See *Durroughs v. Norwich E. R. Co.*, 1 Am. Rep. 73, and note; *Nashus v. Worcester & Nashus E. R. Co.*, 3 id. 243; *Cincinnati, etc., E. R. Co. v. Pontias*, id. 301; *Schneider v. Evans* 3 id. 53; *Toledo, Peoria, etc., E. R. Co. v. Merriman*, 4 id. 530.

HUBBARD, appellant, v. BELL.

(54 Ill. 110.)

Riparian owner — non-navigable stream — jus publicum.

In the absence of prescription or user, it is not a public right to float logs down a non-navigable stream which is only fit for that purpose during periodical freshets; the bed and banks of such a stream are under the absolute owner ship and control of the riparian owner.

BILL in Chancery for an injunction. The facts are fully stated in the opinion.

James Fletcher, for appellant, cited *Cooper v. Bragg*, 10 Wend. 264; 2 Eden on Injunc. (3d ed.) 232, and authorities there cited; *Middleton v. Pritchard*, 3 Scam. 510; 3 Kent's Com. 427; *Town of Lewiston v. Proctor*, 27 Ill. 417; 3 Kent's Com. 420; *Daniels v. The People*, 21 Ill. 439; *Green et al. v. Oakes*, 17 id. 251.

Jackson Frick, for appellee, cited 3 Kent (11th ed.) 358, note 4; *Brown v. Chadbourne*, 31 Maine, 9; *Moore v. Sanborn*, 2 Gibbs, (Mich.) 519; *Morgan v. King*, 18 Barb. 277; *Wadsworth v. Smith*, 11 Me. 278; *Rove v. Granite Bridge Corporation*, 21 Fick. 344; *Browne v. Scofield*, 8 Barb. 243.

Hubbard v. Bell.

BRESEE, J. This was a bill in chancery, in the Union circuit court, exhibited by James Bell against Harlow B. Hubbard, for an injunction, to restrain the defendant from creating a nuisance by felling trees into Big creek.

The case, as presented by the pleadings, is a novel one, and the claim of the defendant in error, which was sanctioned by the circuit court, is of a character so extraordinary as to challenge the most careful investigation.

The facts are briefly these: The complainant in the bill, the defendant in error here, is the owner of certain lots or blocks of ground in the town of Ullin, in Pulaski county, which front on the river Cache, and on which are erected saw mills, planing mills, and lumber yard, of which he is the owner. These structures are four miles below the mouth of a small stream called Big creek. On this creek, commencing two miles above its junction with Cache river, and in Union county, the defendant in the bill of complaint, plaintiff in error here, is the owner in fee simple of all the land on both sides of this stream for two miles up and down the creek, including the bed of the creek, on which he has a saw mill propelled by steam, and for his convenience has erected bridges across the creek at two different points, on his own land, and supplies the mill with logs by hauling and by a tramway leading from the mill to the place of deposit of the logs.

The complainant obtains his supply of logs by floating them down Cache river, and some from Big creek, but from no point above the defendant's lands and mill. He, however, alleges that he has made a contract with one Phelps to cut saw logs for him on Big creek, above the lands of the defendant, which are to be floated down to complainant's mill, when the water in the creek is suitable for such purpose, it being alleged in the bill that it is only at certain seasons adapted to the floating and rafting of logs.

The charge is, that defendant felled trees, on his own land, into Big creek, near his mill, and that they were so felled to prevent the complainant from floating and rafting his logs, timber and trees down that stream, and threatens to fell other trees into the creek, and the prayer is, that the defendant be enjoined from so doing.

The defendant, in his answer, admits the principal and important allegations of the bill, and takes the position that as he is the owner of the lands for two miles on each side of the creek, together with the bed of the creek and its banks, he has the right

to all the timber growing and standing on each side of the creek and on its banks, and to fell and prostrate it over and across the creek at any point over and along the creek and within the boundaries of his lands. He further admits that, in felling the trees growing on the banks of the creek, the tops and branches, and which he could not prevent, fell into the stream by the force of gravitation. He also admits that he does not wish the complainant to raft or float logs over his land, and he further avers that there is much valuable timber on his land, which overhangs the creek, which he intends to cut and fell, and the tops of which, when felled, will necessarily fall into the creek, where it will be greatly to his advantage they should remain until he is ready to work them into lumber. And, in conclusion, the defendant protests against the right claimed by complainant to the use of defendant's land and water as a highway, or as a channel through and by which to float or raft logs to complainant's mill ; that he has at no time given complainant permission so to use his land and water, and has informed complainant he would prevent it, if he could ; and he further says, in his answer, that by using the stream of the creek when suitable for floating, complainant will destroy the bridges erected across the creek, and he avers that Big creek is not a navigable stream, and denies that complainant has any right of way over the same, through and over the lands of the defendant.

On this answer, sworn to, the oath not having been waived, the defendant moved to dissolve the injunction, which motion was overruled, and the cause set for hearing on the bill and answer, no replication having been filed by the complainant, and on such hearing, without any proofs, the injunction was made perpetual.

To reverse this decree, the record is brought here by writ of error.

The pleadings establish the fact that Big creek is not a navigable stream, and by the common-law it belongs, its banks and bed, to the riparian proprietors, of whom the plaintiff in error is one to the extent of two miles up and down the stream.

The precise character of this stream is not stated, nor does it appear anywhere in the record. Its length, breadth, or dimensions of its bed above its confluence with the river Cache, are undisclosed, nor have we any means of ascertaining the ordinary volume of water contained in the bed, or its quantity during freshets. We are led to infer, from what is stated, that it is an inconsiderable stream, nearly or wholly dry in the summer season, and carrying a

Hubbard v. Bell

volume of water sufficiently powerful to float logs or rafts only in seasons of freshets, and then for a few days or weeks only. The beds of all such streams we know judicially, have been surveyed by the government of the United States, and sold, and on which the purchasers or their assigns pay an annual tax to the State, besides local assessments made upon them. They are, to all intents and purposes, private property. Being so, the question is presented by the plaintiff in error, and it arises on the record—indeed it is the only question of any magnitude in the case, is this private right subservient to the public use?

As preliminary, it may be stated that it does not appear, by this record, that Big creek was ever used, at any season, above the lands of the plaintiff in error, for the purpose of floating rafts or logs. The allegation is, that Phelps was employed to cut logs, and had a portion of them in the creek ready for floating. The natural capacity of the stream for floating, above the lands of plaintiff in error, does not appear to have been ascertained, and there is no evidence it has ever been used for that purpose.

The defendant in error starts with this proposition: If a stream may be used, though only at certain seasons of the year, for floating logs, the capacity for such use will render it subject to the *jus publicum*, at least for that purpose.

For this, defendant in error has what seems authority, in the cases of *Brown v. Chubbourn*, 31 Maine, 3, and *Moore v. Sanborne et al.* 2 Mich. 519.

In the case first cited, which was an action on the case for maintaining a dam across Little river, and thereby obstructing the passage of the plaintiff's logs, it appeared that the defendant was the owner of the land on both sides of the river where the dam was built and had mills there. The plaintiff had a quantity of logs in the river for the purpose of being driven to his mill below the defendant's dam, but they were prevented by a mass of logs belonging to the defendant above the dam. On request to remove the obstruction, the defendant refused, insisting that the plaintiff had no right to drive logs on that part of the stream, and forbidding him to drive them. The plaintiff thereupon boomed the defendant's logs, and opened some old sluice-ways belonging to the defendant, and in this way passed his logs below the defendant's dam. To recover for the hindrance and expenses in getting his logs by the dam the action was brought.

The defendant contended, that at the place where his lands lay, the river was wholly his property; that the public had no right of passing upon or using it, and that the plaintiff had no right to run logs there.

The plaintiff disclaimed any right arising from prescription or user by himself or others, but placed himself on the broad ground, that, from the intrinsic capabilities of the river, any citizen had the right to use it for moving logs.

Much testimony was heard as to the capacity of the river, and it was proved that dams were necessary in some stages of the stream, in order to obtain sufficient water for floating, and it was proved that it had been used many years for floating logs and rafts, and sometimes boats.

The defendant asked the court to instruct the jury, that to constitute Little river a navigable or floatable stream, it must be shown to be capable, in its ordinary and natural state, of floating logs, boats and rafts; and it was not enough to prove that logs might be carried down at certain seasons of the year, when the stream was swollen by a freshet.

This instruction was refused, and in commenting upon it, the supreme court say:

"A test so rigid and severe as that required by this instruction, would annihilate the public character of all our fresh rivers for many miles in their course from their sources toward the ocean. The timber floated upon our waters to market is of great value, and neither the law nor public policy requires the adoption of a rule which would so greatly limit their use for that purpose. The right to the use of the stream in question must prevail whenever it may be exercised, at any state of the water."

The court also said: "The true test to be applied is, whether a stream is inherently and in its nature capable of being used for the purposes of commerce for the floating of vessels, boats, rafts or logs. When a stream possesses such a character, then the easement exists, leaving to the owner of the bed all other modes of use not inconsistent with it."

The case of *Moore v. Sanborne et al. supra*, was an action on the case to recover damages for an alleged obstruction of Pine river, claimed to be a public highway. This river is a small stream emptying into the St. Clair river, and navigable from its mouth to a place called "Deer Licks," a distance of six miles, at all seasons

Hubbard v. Bell.

of the year, for boats, rafts and logs, while above the "Deer Licks," and to a point above where the parties used the same, the river was only capable of being used for floatage during the periodical freshets, and that the usual duration of the freshets was from two to three weeks. It appeared, also, that the river had been used for running logs and lumber for fifteen or sixteen years, and from the "Deer Licks" down, more than twenty years.

The court instructed the jury, if they should find Pine river to have been used as a highway for the purpose of floating mill logs, even though at times, at low water, it was not capable of floating them, they should find it a public highway, to the use of which the public had a right; and the court further charged, that Pine river, up to the point where the logs were put into it, and from which point they were run to market, or to the mouth of the river, was a public highway, in which the whole public have an easement; that although the soil over which the river runs may be owned by the adjacent proprietors, the riparian owners, the public have the right to the use of the river in floating to a market logs, rafts, etc., found or produced upon its banks. The court refused to charge, on behalf of the defendant, that if the jury should find that Pine river and its branches, above the point on the river known as the "Deer Licks," are not of sufficient depth to float mill logs in an ordinary stage of the water, the river and its branches above such point is not a public highway or navigable stream; and also refused to charge for defendant, that if the jury should find that Pine river, above the "Deer Licks," is not of sufficient depth to float logs in an ordinary stage of water, and has not been used for floating logs for a period of twenty years or upward, it is not a public highway, and defendant was not liable in the action.

These several rulings of the court were sustained by the supreme court, and the doctrine of 31 Maine, *supra*, adopted in its fullest extent. The principle is distinctly asserted, that the public have the right to the free use of all streams which are susceptible of any valuable floatage. And to this extent is the claim of the defendant in error. He claims, if Big creek, which, from its mouth to its source, is private property, bought of the United States and paid for, and which may exhibit for the greater portion of the year but a dry bed of gravel and sand, and which has been crossed by fences and bridges, and occupied by other structures reared by the owners, is, notwithstanding, when a freshet occurs of one week's duration,

subject to be entered upon by the public, and to be appropriated to floating logs, to the destruction of fences, bridges or other necessary structures, and in defiance of the proprietors of the same. We cannot sanction a doctrine fraught in its application with such consequences. However necessary it may be in the great lumbering States of Maine and Michigan, that private rights should yield to the prevailing interest, no such necessity exists in this State, and we shall be careful that the rights of its citizens shall not be wrongfully invaded upon such pretenses as are set forth in this record, and sustained by such considerations as influenced the judgments of the courts whose opinions we have considered.

The argument urged in 31 Maine by the successful party, was, that the great common law right of using as a public highway all the streams in that State susceptible of floating a log to market, lay at the bottom of their public prosperity, and that the hundreds of small streams which their lumbermen annually ascend for winter operations, and which, in the freshet season, bear back to market the fruits of their industry, ought to be public highways, and the court, in the opinion, say:

"The timber floated upon our waters to market is of great value, and neither the law nor public policy requires the adoption of a rule which would so greatly limit their use for that purpose. The right to the use of the stream in question must prevail, whenever it may be exercised, at any state of the water."

The facts appearing in these cases are quite different from those which appear in this case, and in both of those cited, the streams in question had been used for rafting and floating for years, and had a natural capability for such use. This record is barren of any facts of this kind.

But in the case in 31 Maine, reference is made to *Rowe v. Granite Bridge Co.* 21 Pick. 344, in which it was held, "that it was not every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. In order to have this character, it must be navigable to some purpose useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture."

This cannot be alleged of Big creek. It cannot be said, that

Hubbard v. Bell.

stream is generally and commonly useful to any purpose of trade or agriculture. In its normal condition, it is a bed of sand and mud or gravel, diversified, perhaps, by pools of water left by the subsiding floods, and separated from each other by sand banks. To say of such a stream, that it is generally and commonly useful for purposes of trade, is saying too much.

It is further admitted in the Maine case, that "small creeks or inlets which can only be used at certain periods of the tide, and then only for a short time, or in which there is only a possibility of use under some circumstances, at extraordinary high tides, are not navigable rivers. Such streams are incapable of any practical general use for the purposes of navigation, and are dissimilar to the river under consideration."

Certainly not more dissimilar than the creek in question, which, only in its abnormal state, in times of freshets or melting of snows, makes a show of navigable water. In its normal state, it is shrunken to the smallest measure, and that state continues, perhaps, ten months out of the twelve.

Other cases are cited by the defendant in error, and among them *Morgan v. King*, 18 Barb. 277. The stream in question, in that case, was a river more than 150 miles in length, being the outlet of many lakes and ponds in northern New York, and emptying into the St. Lawrence. It was a river the State had taken under its charge, making appropriations for its improvement, and had been used as a public highway for lumber and floats more than thirty years.

In that case, a doubt is expressed, if a stream having a capacity to float single logs at random, and only during freshets, can be regarded as a public stream. But the court held, that the capacity of a stream, which generally appears by the nature, amount, importance and necessity of the business that can be done upon it, was the criterion; and they say that a brook, though it might carry down saw-logs for a few days during a freshet, is not, therefore, a public highway. But they say, a stream upon which and its tributaries, saw-logs to an unlimited amount can be floated every spring, and for the period of from four to eight weeks, and for the distance of 150 miles, and upon which, unquestionably, many thousands will be annually transported for many years to come, has the character of a public stream, *for that purpose*. And the court further say, if this particular business may not always continue, though it can,

of necessity, last but a short time, and the river can be used for no other purpose, that circumstance would have weight in the consideration of the question.

The case of *Browne v. Scofield*, 8 Barb. 239, is also referred to. In that case, the Canisteo river was held to be a public highway from the early settlement of the country, and was always used, from a very early day, as an avenue to market. There was no attempt, on the trial, to dispute the right of the public to use the river as a highway at common law. The case holds only, that those great natural channels and avenues of commerce, whenever found of sufficient capacity to float the products of our fields, forests or mines to market, the common law adjudges as to such a right of passage to the public.

Reference is also made to *Shaw et al. v. Crawford*, 10 Johns. 236. The stream in question, in that case, the Battenkill, had been used for rafting twenty-six years and upward, and the right to float lumber was based on that fact. Reference is also made to *Wadsworth v. Smith*, 11 Maine, 278. There the principle of the common law was adverted to, that above the flow of the tide, rivers become private, either absolutely so, or subject to the public right of way, according as they are small or large streams. Those which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right, and the private property of the owner of the soil is to be improved in subserviency to the enjoyment of this public right. And the court say, if the brook in question was naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose, but such little streams or rivers as are not *floatable*—that is, can not, in their natural state, be used for the carriage of boats, rafts or other property, are wholly and absolutely private, not subject to the servitude of the public interest, nor to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public.

This, so far as we know, is the condition of Big creek.

Another case bearing upon this, not cited, we have examined. It is *Munson v. Hungerford*, 6 Barb. 265. This was an action on the case to recover damages for injury to the mill-dam of plaintiff across Black river, caused by floating logs by the defendant against the dam.

Hubbard v. Bell.

The defendant claimed the right to navigate the river by floating logs upon it, notwithstanding the exercise of that right might involve the destruction of property of individuals invested in mills and factories depending upon dams for their supply of water.

The question was, whether Black river was navigable, within the meaning of the authorities, so as to subject it to the use of the public.

The court say, quoting from Hale, *de jure mare*, a stream, to be navigable, must furnish "a common passage for the king's people," must be "of common or public use for the carriage of boats and lighters," must be capable of bearing up and floating vessels for the transportation of property, conducted by the agency of man. It is not enough that a stream is capable during a period, in the aggregate, of from two to four weeks in the year, when it is swollen by the spring and autumn freshets, of carrying down its rapid course whatever may have been thrown upon its angry waters, to be borne at random over every impediment in the shape of dams or bridges which the hand of man has erected. To call such a stream navigable in any sense, is a palpable misapplication of the term.

Upon the question of the alleged usage to float logs, that was out of the question, as no usage was shown extending beyond ten years. The defendants were, therefore, compelled to rely upon a dedication by the riparian owners of the stream to the public, for the use and purpose of floating logs two or three weeks of the year, during the swollen freshets, over the rapid current of the river, in such a manner as to endanger and seriously injure the dams of factories and mills scattered all along the course of the river.

The court say that this principle would be confined to a few individuals, the owners of land on the river, and the owners of four or five saw mills upon it, and, therefore, would be in no sense a public right, to be enjoyed by the public at large, and it could only be enjoyed for a few days in the year, and that when the river is swollen to five times its usual size.

There is no question of this kind arising in this case, but the case has a strong bearing against the claim of defendant in error. The time may come when the lands upon Big creek shall be adorned with the most beautiful country seats, with lawns and groves, and structures of taste and costliness, yet the bed of the stream will remain, and some mill owner upon Cache may demand the right to destroy all this beauty, in order to give him a free passage for his saw-logs.

The cases in 31 Maine and 2 Michigan, are based upon grounds we cannot sanction, while those cited from New York are placed upon the more practical ground of user. To this principle we do not perceive any objection, but this case is not within it.

It may be, we are under a mistaken impression as to the true facts of this case, the record being so barren; but, taking the record as it is, we cannot perceive the least ground on which to base the claim of the defendant in error, and do not think he was entitled to an injunction in the first instance, certainly not to a decree making it perpetual. There was error in so decreeing, and for the error the decree must be reversed and the cause remanded.

Decree reversed.

NOTE.—The decision in *Brown v. Chadbourne*, *supra*, was followed and approved by the same court in *Treat v. Lord*, 42 Maine, 552. But it is further held in both cases that, while capacity to float logs at certain intervals will render a stream a highway for the purpose, yet, if such stream is incapable of being used without traveling on its banks to propel the logs, there is no public servitude. However, an occasional necessity to use the banks will not destroy the public right. The Maine courts have uniformly held that capacity to float logs renders a stream a public highway. See *Yeazle v. Dwinel*, 50 Maine, 484; *Berry v. Carle*, 3 Maine, 269; *Kuge v. Chaloner*, 42 Maine, 150; *Lancy v. Clifford*, 54 Maine, 489.

In addition to the cases cited in the opinion, there are the following cases touching the point at issue: In *Curtis v. Kessler*, 14 Barb. 511, it appears that the stream in its natural state was not capable of floating a log, although when swollen by freshets it would bear up a raft, and the court held that it was not a public highway. See also *Rhodes v. Otis*, 83 Ala. 578. The latest decision in New York is that of the court of appeals, in *Morgan v. King*, 35 N. Y. 454. The facts of the case are given in the above principal case, where the decision of the supreme court is noticed. The following rule was laid down by the court of appeals: "The true rule is, that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or the tillage of the soil upon its banks. It is not essential to the right, that the property to be transported should be carried in vessels, or in some other mode whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being thus navigated against its current, as well as in the direction of its current. If it is so far navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be literally supported. Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement." The Racket river was held not to be navigable, even within the liberal rule above, as it was not capable of floating even single logs, except during seasons of high water, which were about two months in a year; and the logs so floated had to be aided in their passage by men in skiffs, canoes, or on shore, and then the logs were sometimes badly injured, and the ends were more or less broomed up.

In California it is held that a stream having capacity to float only logs, whether continuously or periodically, is in no sense navigable. *American River Water Co. v. Amesen*, 6 Cal. 443. In *Barclay Railroad, etc.*, v. *Ingraham*, 36 Penn. St. 201, it is said, *arguendo*, that streams are navigable if of sufficient capacity, at any stages of water, to be used for the transportation of lumber or other goods. In Tennessee it is held that the public have an easement in shallow

 Illinois Central Railroad Company v. Slatton.

streams which are of sufficient depth for valuable floatage, as for rafts, flat-boats, and perhaps small vessels of lighter draft than ordinary. *Stuart v. Clark*, 2 Swan, 16; *Elder v. Burrus*, 6 Hump. 364. The South Carolina courts, while declining to define a "navigable" stream, said that that would not be a navigable stream, the natural obstructions of which prevented the passage of any boats whatever. *Catts v. Wadlington*, 1 McCord, 538.

The mere fact that a stream has been made navigable by artificial means, as by widening or deepening, by the owner of the bed and banks, will not render it a highway where it was not so before. *Wadsworth v. Smith*, 11 Maine, 278; *Veasey v. Dwinel*, 50 Maine, 479; *Morgan v. Atg*, 35 N. Y. 454.

The right to raft logs down a stream does not include the right of booming them upon private property for safe keeping and storage. *Lorman v. Benson*, 8 Mich. 18.

Above tide water the onus of proving that a stream is public and navigable is on the party claiming that it is; the presumption being that fresh water streams are not navigable. But when the facts are ascertained, it is a question of law for the court whether a stream is a public highway. *Rhodes v. Otis*, 33 Ala. 578.

In determining whether a stream is navigable, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public generally, or only a few individuals, are interested in the transportation on it; whether any great public interests are involved in the use of it for transportation; whether its capacity for floatage continues for periods long enough to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and, if so, how long; how it was considered and treated in the government survey; and whether, if declared public, it will probably be of public use for carriage in future. *Rhodes v. Otis*, 33 Ala. 578.—*REP.*

 ILLINOIS CENTRAL RAILROAD COMPANY, appellant, v. SLATTON.

(54 Ill. 133.)

Railroads—contributory negligence—passenger.

In an action against a railroad company to recover for the death of a passenger it appeared that the train, upon which deceased was traveling, having stopped at a station, remained a reasonable time for passengers to alight, but he, not availing himself of the opportunity, waited until the train began to move, when, in attempting to leave the cars, he was fatally injured. *Held*, that the company was not liable, there being no proof of mismanagement of the train or careless conduct of the employees.

ACTION on the case brought to the Perry circuit court, by Susan Slatton, administratrix on the estate of John W. Slatton, against the Illinois Central Railroad Company, to recover damages for having caused the death of the intestate, by the negligent management of a train.

There were two counts in the declaration, one alleging that while deceased was using due care when alighting from the train at Tamaroa, the train was suddenly and violently started forward, by means

Illinois Central Railroad Company v. Slatton.

whereof deceased was thrown under the wheels, and injured so that he died.

In the other count it is alleged, that as deceased was about to alight from the train, using due care, he was violently pushed off by the servants of the company in charge of the train, whereby he was thrown under the wheels, receiving a fatal injury.

The general issue was pleaded and the cause tried by a jury, who found for the plaintiff, and assessed the damages at \$1,166.

A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which the defendants appeal.

The opinion states the rest of the case.

George. W. Hall, for appellant.

Edward V. Pierce and *William M. Christian*, for appellee.

BRESEE, J. (after stating facts.) There was much testimony heard, and, as usual in such cases, not entirely harmonious.

The rule of law need not be repeated, that, to justify a recovery in this action, the allegations of the plaintiff must be sustained by the evidence; and when the evidence is conflicting, the verdict must stand, unless it shall appear that, although it is conflicting, the weight is decidedly in favor of the defendant.

The first count charges as negligence on the part of the defendants, that while deceased was leaving the car, using due care, the train was suddenly and violently started forward, by means whereof he was thrown under the wheels, and so injured as to cause his death.

It can not be claimed that the evidence tends, in the slightest, to substantiate this charge—no witness has spoken to that point, consequently, these allegations are not sustained.

The second count charges that the deceased was violently pushed off the train by the servants of the defendants in charge of the train, whereby he was thrown under the wheels, and was injured fatally.

The case was put to the jury mainly on this count. The theory of the plaintiff evidently was, that some employe of the company used force in putting the deceased off the train while it was in motion, and it was so put to the jury by the first instruction asked by the plaintiff.

Illinois Central Railroad Company v. Slatton.

If there existed reasonable grounds for the hypothesis of the second count, the civil authorities, indeed, the whole people of Tamaroa, were greatly remiss in their duty, in not pursuing the offender in order to his prompt punishment, for it was murder, most foul and terrible. It cannot be possible that such a fiend was employed by this company in their service.

John W. Parlier, in his testimony, gives some color to this theory, and so does Robert Murray, a lad about sixteen years of age when the accident occurred, in a slight degree, when he says there was some man on the car platform behind deceased; thought it was some man belonging to the train—the brakeman or conductor; did not see him after deceased fell; when he first saw deceased, he was standing with one foot on the car steps, and one foot on the station platform, with one hand on the railing; the man had on a cap; did not see any badge on it; thought he was a brakeman or conductor; had seen him pass through on the train before, several times; he (the man) was standing on the car platform; did not say or do anything to the deceased; saw deceased get off; thought he had one foot on the platform of the station; the train had moved eighteen or twenty feet. On his cross-examination, he says the man was a low, heavy set man; he also says there were two cars behind the one he (meaning, evidently, the deceased) was on, and another, which would make three cars, when the proof is overwhelming, deceased came out of the car next forward of the last car.

It is fully proved that no employe on the train could have interfered with the deceased, in any particular, unless, possibly, Glaseford, who states he did leave his station, which was on the front end of the last car, and got out on the station platform at Tamaroa, and passed through one or two cars to regain his position, and he testifies he did not see or touch any soldier getting off, nor say anything to any one of them who got off at Tamaroa, and knew nothing of the occurrence until he was told of it by a soldier.

The second witness for plaintiff, Mr. Corgan, gives a very full and clear account of the occurrence, of which he was an eye witness. He says he saw the deceased when he was injured; was within fifteen feet of him; was on the platform opposite to him, about six feet from him, when he fell; he was in the car with the soldiers; saw him when he came out of the car; seemed to be feeble, and held on to the railing of the car; as he came out of the car door a man took hold of his arm, apparently for the pur-

Illinois Central Railroad Company v. Slatton.

pose of helping him off; he seemed to be aiding the deceased, and helping him to get off; saw no badge by which to distinguish him as belonging to the railroad; saw him open the door and assist deceased to get off; deceased was holding on to the railing, and was holding on to it when he fell; train was moving slowly when he came out of the car; seemed to be just starting when he came out; it was about noon. On his cross-examination, he says there was nothing unusual about the conduct of the train, except that there was a large crowd of people on the platform; saw James, the brother of deceased, same day; when he first saw deceased, he was inside of the car; saw some man helping him who appeared to be friendly; deceased stepped down the steps, holding on to the railing with his hands, and got both feet on the station platform; he would not have got hurt if he had not held on to the railing after he got off the steps; held on to the railing with both hands; was pulled along twelve or fifteen feet when he fell down; think both feet were on the station platform.

In connection with this testimony, and strongly corroborative thereof, is the evidence of D. C. Barber, a witness for the defense, and known as a prominent and intelligent citizen of Tamaroa. He says he saw deceased the day he was hurt; saw the occurrence; the train stopped some time; the soldiers were getting off and meeting friends, and there was a good deal of bustle; saw the man coming out of the car door; one or two men in the garb of soldiers were helping him, as he seemed to be feeble; he stepped on the steps, and then got on to the platform; he held on the railing too long, and was dragged some distance before he fell; witness started to catch him, but he lost his hold before witness could get to him; his head was struck by the steps, or some part of the train, after he fell; in trying to rise, his leg got under the car and was crushed; saw him when he came on the platform; soldiers were helping him and had hold of him; the train was in motion, and he would not let go of the railing, and was dragged down; don't know who the persons were that were holding him; they were dressed as the other soldiers; he was stepping down the stairs very carefully; heard no remark made to him; saw no one push him or shove him; all that was done, seemed to be with a friendly design; thinks they had their hands under his arm to help him.

On his cross-examination, he says he was standing on the depot platform; two persons seemed to be assisting deceased; judged they

Illinois Central Railroad Company v. Slatton.

were soldiers, from their garb; deceased stepped on the platform with his feet; his feet got on the platform (station), and by reason of his holding on to the railing, he was dragged along and pulled down; it was the noon train, going south; was there when the train came up, and it stopped longer than usual; a good many got off, and friends were meeting them; did not see any badge on the caps of the soldiers or persons who were helping the deceased.

This testimony of Mr. Corgan, the plaintiff's witness, and Mr. Barber, the defendants' witness, explodes the theory that deceased was improperly dealt with by the employes of the company, and is at variance with that of Mr. Parlier, who says he thinks deceased did not have hold of the railing when he tried to get off the car.

In addition to this is the testimony of Ezra Woods, on the part of the defense. He says he saw the accident; when coming back from the baggage and express car, he saw deceased coming out on the car platform; saw him stepping off the steps of the car on to the depot platform; and just as he fell, Porter, who was beside witness, said, "look there;" first noticed deceased when he was stepping down the steps; he had his hands on the railing; the train was just moving at the time, very slowly; knew the brakemen and trainmen; saw no one touch deceased; several soldiers were on the platform at the time; witness was standing where he could see; did not hear any one say anything to him; train stopped longer than usual, two or three minutes.

On his cross-examination, says when he first saw deceased, he was going down the steps; had hold of the railing; could not say that his feet struck the platform; had hold of the railing as he fell.

George W. Kenney testifies he was on the platform when the train arrived; it stopped from two to five minutes—longer than usual; saw deceased when he was first standing on the car platform; was coming out of door; did not know he was going to get off the train until he struck the station platform; saw him at that time plainly; saw no one, or heard any one say or do anything to him; three to five soldiers on same platform of car; he stepped on the steps, and had hold of the railing with his hands when he stepped on the first step; saw him get on the station platform with his feet, but he still held on to the railing of the car, and the train dragged him from six to eight feet; the train had just started when witness first saw him; heard no one say or do anything to him; saw him after the train had passed; was the second man that took hold of him.

Illinois Central Railroad Company v. Slatton.

Henry Clay saw the accident; train stopped longer than usual; saw the man that was hurt; his impression is the man was on the platform when the train started; remarked to some one, when witness saw him "scrambling" and clinging to the rail, that he was sick and would get hurt.

It was agreed by the parties that Nelson Holt, the station agent, who was absent, would testify, if present, that he had a fair opportunity of seeing all that happened; that he knew the employes of defendants as were at the time running on the passenger train passing Tamaroa; that the train in question stopped at the station more than the usual length of time, and long enough to enable passengers to get off; that deceased was not thrown or pushed off, or negligently jostled off by any brakeman or other person employed on that train; or if done, witness did not see it.

We think this testimony overthrows the theory on which this case is based, and is so overwhelmingly in favor of the defense, as to demand from the jury a favorable verdict.

The evidence recited satisfies us that deceased had got on to the station platform, and still clung to the railing of the car steps, and by so doing was dragged to his death. This was no fault of the company. No negligence can be imputed to them, unless it be shown that by bad management of the train, or careless conduct of their employes, deceased was placed in a perilous situation. The proof is abundant that the train stopped an unusual time; for a time sufficient to enable the passengers to leave it safely. If the deceased did not avail of this opportunity, but chose to attempt to get off when the train was again in motion, and this without the direction or knowledge of any employe on the train, it was his folly, and the consequences of it must rest upon him alone.

The testimony so greatly prepondering in favor of appellants, the verdict should have been in their favor. The court should have set it aside on the motion for a new trial. It was error to refuse the motion.

For this error, the judgment is reversed and the cause remanded.

Judgment reversed.

Hartford Fire Insurance Company v. Walsh.

HARTFORD FIRE INSURANCE COMPANY, appellant, v. WALSH.

(54 Ill. 164.)

Fire insurance—effect of renewal—construction of policy—mortgage.

A renewal of a policy of fire insurance is, in effect, a new contract of insurance, and, unless otherwise expressed, on the same terms and conditions as the original policy; and a notice that the insured premises had become vacant, required and given under the original policy, should be given again under the renewed policy, the same state of vacancy continuing.

A mortgage does not come within the provisions of a policy of fire insurance, prohibiting, without consent, any change "in the title or possession of the property, whether by sale, voluntary transfer or conveyance."

ACTION by Walsh against the Hartford Fire Insurance Company, on a policy of fire insurance.

The facts appear in the opinion.

Charles P. Wise, for appellants.

L. & L. Davis, for appellee.

WALKER, J. This was an action of assumpsit, brought by appellee to the September term of the Alton city court, against appellants, on a policy of insurance. It appears that appellee was, on the 4th day of June, 1866, the owner of a two-story and a one-story frame dwelling in the city of Alton, and that, in consideration of a premium paid the company, it issued a policy of insurance upon these houses to appellee, and insured the two-story house at \$1,200, and the one-story house at \$500, for one year from that date, against loss by fire, and in case of loss, the money to be paid in sixty days after notice and proof of loss; that in May, 1867, and before the policy expired, it was renewed for one year, and it was again, in June, 1868, renewed for another year; that about the 23d of December, 1868, the houses were both destroyed by fire; that in January, 1869, notice of the loss was given, and proof was made and rendered to appellants, and that the company had failed to pay the insurance money to appellee.

Appellants pleaded the general issue, and gave notice that on the trial they would rely upon the fact that the two-story house had remained vacant and unoccupied more than thirty days before it

Hartford Fire Insurance Company v. Walsh.

was burned, without giving notice as required by one of the conditions of the policy, whereby it had become void; that the policy, as to the one-story house, had become void by appellee having increased the risk on the same after the policy was issued, by changing it from a dwelling-house to a fancy dry goods store and a dwelling, and was so used when it was burned, and that in violation of the policy, appellee had made a voluntary transfer and conveyance of the insured premises.

It is urged, as one of the conditions in the policy was, that, if the premises were vacated by the removal of the owner or occupant for a period of more than thirty days, without immediate notice to the company and consent indorsed on the policy, it should become void, that condition was violated by the removal of appellee from the two-story house, and subsequent removal of a tenant who occupied the house; and that it had remained vacant more than thirty days without notice to the company, and their consent indorsed on the policy. That the house did thus become and remain vacant is not contested, but it is insisted, and the evidence seems to justify the conclusion, that notice was given to the agents in May, 1867, and that one of them gave his verbal consent. It also appears that, subsequently to that time, the agency was changed, and McPike and Newman acted for the company from that time until the fire, and there is no pretense that any such notice was given to them, or any other person, at or subsequent to the time of the second renewal, which was obtained through them.

A renewal of a policy is, in effect, a new contract of assurance, and, unless otherwise expressed, on the same terms and conditions as were contained in the original policy. If, then, the property was occupied when the last renewal occurred, it, under the terms of the policy, became the duty of the assured to give the same notice that was required in the policy, and to obtain the consent of the company. No one could, for a moment, contend that the consent given a year previous to the last renewal could have bound the company, had it been a new application, survey and policy granted, instead of the renewal. And in what does this renewal differ from the grant of such a policy? The old contract ended on the fourth, and the renewal bears date the eighth day of June, 1868, four days after the policy had expired. It then appears there can be no pretense that there was a continuation of the former insurance, but it must be regarded as a new contract, upon the same terms and conditions

Hartford Fire Insurance Company v. Walsh.

as entered into and formed the original contract of insurance. The argument, then, that the notice given to the former agents was notice to the company, and bound them, does not apply. Such notice and consent, although not indorsed on the policy, was, no doubt, sufficient, had the loss occurred under the policy then in force, but cannot operate to dispense with the condition contained in the new policy. It may be, and we are inclined to think that these policies are so far overloaded with terms and conditions that they hardly amount to contracts to insure, but between parties able to contract they have the right to insert them, and when inserted, we must give them force and effect, although we may doubt the propriety of persons taking policies so burdened with conditions.

(The judge here disposes of a question of evidence.)

It is again objected that the court below erred in rejecting evidence that appellee had mortgaged the premises after obtaining the policy, without the consent of the company. The condition in the policy which is supposed to prohibit the mortgaging of the premises, is this: "Or if any change take place in the title or possession of the property, whether by sale, legal process, judicial decree, voluntary transfer or conveyance, or if the policy is assigned, without consent of the company indorsed thereon." Does a mortgage come within the provision? It is not a sale, either in its ordinary or technical sense. There is no pretense that the title was affected by legal process or judicial decree, nor can it be said that there was, according to the usual acceptance of the terms, a voluntary transfer or conveyance. In enforcing forfeitures, courts should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction which will not produce such results. According to popular use, these terms, nor any of them, are understood to embrace a mortgage, and this being so, we would not enforce a forfeiture, if some one of them could be held technically to embrace such an instrument. *The Commercial Ins. Co. v. Spankneble*, 52 Ill. 53. Forfeitures are odious to the law, and when we see these policies burdened with conditions rendering it exceedingly difficult for the assured to observe them, whether he occupies the premises or not, we feel no inclination to strain for a construction of these conditions that will defeat a recovery, but shall content ourselves by giving the language a fair and reasonable interpretation. It is believed that if the agents would exercise more care in the character of the person they insure,

Taylor v. Atchison.

and the character and situation of the property upon which they take risks, there would be less necessity for so large a number of conditions.

Whether the risk was increased by using one of the rooms in the smaller house, is a question of fact to be determined by the jury under proper instructions from the court, and, as the case will have to be passed upon by another jury, we refrain from commenting on the evidence. We are at a loss to perceive how, by permitting the two-story house to become vacant without notice to and consent from the company, could invalidate the policy on the small frame dwelling. So far as the instructions violated the rules here announced, they were erroneous, and for that reason the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

TAYLOR, appellant, v. ATCHISON.

(54 Ill. 194.)

Promissory note — fraud in inception — false contract.

Where a person signs a paper, believing it to be an ordinary contract for service, which afterward proves to be, or to contain, a negotiable promissory note, such person, having exercised reasonable precaution and prudence to avoid fraud and imposition, is not liable on the note to an assignee before maturity.

ACTION of assumpsit, brought by appellant in the Jefferson circuit court, against appellee, on a promissory note for \$140, payable to S. W. Barbour, on the 1st of October, 1868, with interest, and bearing date the sixteenth of May, of the same year. The note was assigned to appellant, without recourse, and the indorsement is without date. The general issue, and a plea that the note was obtained by fraud and circumvention was filed, and a trial was had by the court without a jury, by consent of the parties. After hearing the evidence, the court below found for defendant, and rendered judgment for costs. A motion for a new trial was entered, but was overruled by the court, and judgment rendered on the

Taylor v. Atchison.

finding, and the record is brought to this court on appeal, and a reversal is asked.

The remaining facts appear in the opinion.

Tanner, Casey & Wilbanks, for appellant.

J. H. Patton and J. K. Albright, for appellee.

WALKER, J. (after stating certain facts.) It appears that Barbour and Lowry went to the house of appellee, in the spring of 1868, and represented that they were procuring agents to sell reapers, screw-forks and mowers, and solicited appellee to become an agent for their sale, in two townships. He declined, saying he would not become bound for anything; and they represented that they wanted no obligation of any kind. Appellee then assented, upon the condition that he should incur no liability. They agreed to send implements to the express office at Mount Vernon, Jefferson county, in this State, and he was to incur no expense, or pay anything on the machines, except express charges. The prices at which they were to be furnished, and the commissions he was to receive, were agreed upon at the time.

They then proposed to give him an agreement that would protect him in making sales, as the articles were patented. Barbour prepared an agreement, which was handed to appellee for his signature; but being unable to read it without much difficulty, he requested that it be read, which Lowry did. Another instrument was then presented, which they assured him was a duplicate, when he signed both papers. Appellee and one Allen, who was present, both swear that both papers were larger than this note, and about the same size, and neither of them resembled the note sued upon in appearance; that they were much larger. We are satisfied that the testimony given by appellee, and corroborated by Allen, establish these facts.

That appellee did not design to execute the note, and was ignorant of the fact that he had, we think it clearly established by the evidence. We presume that Barbour must have attached the note at the bottom of the page, and below another writing, and thus procured his signature to the note without exciting the suspicion of either appellee or Allen, and subsequently detached it from the other written matter; that there was a fraudulent device and trick

- practiced, by which appellee was circumvented, is obvious; that it was an outrageous, unmitigated fraud, we entertain no doubt.

It, however, remains to determine whether it constitutes such a fraud or circumvention as was contemplated in the adoption of the eleventh section of the chapter entitled "negotiable instruments." It is urged that it is not, as appellee could read, and it was his duty to have availed himself of all the sources of information at his command, precisely as should the purchaser of personal property, as to its quality; and having failed to do so, he is estopped from interposing this defense. This is not, we think, the true construction of this section of the statute. At the common law, a person who was thus imposed upon in the execution of a negotiable instrument, could interpose the fraud as a defense only as against the payee; and it was manifestly the design of the general assembly to alter the common law so as to permit the defense to be made in cases where it could not at common law. And it must be that it was intended that the defense should be extended even to persons who could read, where he has observed reasonable prudence and precaution, and also to give the defense against such an instrument in the hands of an assignee before maturity. These we have no doubt, were the changes designed to be made by this enactment. We perceive no other.

It is, however, necessary that a person executing such an instrument, which is procured by fraud or circumvention, should use reasonable and ordinary precaution to avoid imposition, when the suit is by an indorsee before maturity. If able to read readily, he should examine the instrument, or procure it to be read by some one in whom he can place confidence. If he is unable to read, or does so with difficulty, then he may avail himself of the usual means of information, by having it read by some person present. He cannot act recklessly, and disregard all the usual precautions to learn the contents of the instrument, and then interpose the defense against an assignee. As to the payee, it may be otherwise. Did appellee use ordinary precaution? It appears to us that he did. He could read the writing with much difficulty, and being assured that it was a contract in which he incurred no liability, he desired it read, which was done, and was then assured that the other paper was a copy of that which had been read. While this may not be the precaution which would have been observed by an unusually cautious man, still, we think he acted as the great mass

Taylor v. Atchison.

of men not in, or educated to, business act in such cases. And he was only required to use reasonable caution, such as govern the majority of prudent men.

Had appellant called on appellee, he could have learned that the note was procured by fraud or circumvention. He was applied to by patent right agents, strangers to him, and he, as a prudent man should have had his suspicions aroused by the fact that they were selling patent rights, to the same extent as should appellee. They were both acting with the same men who perpetrated a gross fraud on each, and both were equally required to use diligence. We think, under the circumstances, that appellant lacked prudence in taking the note from the payee; but be that as it may, the statute has given the defense, and appellee may avail of it against appellant.

It is urged that, in case of the purchase of personal property, the vendee is bound to use every reasonable precaution to ascertain the quality of the thing sold, and hence, appellee should be held to the same degree of diligence. The proposition as to the vendee is true, with proper limitations. It is true where there is only commendation of the property employed, and there is neither warranty nor fraud. But where there is fraud employed by the vendor, and it is relied upon by the vendee, although not exercising the highest degree of diligence, the fraud will absolve him from the agreement. So in this case. There was fraud to induce the execution of the note, and it was relied upon by appellee, and being thus procured, it was void under the statute. This case comes fully within the construction given to the statute by the previous decisions of this court, and the judgment of the court below must be affirmed.

Judgment affirmed.

NOTE.—See *Douglas v. Muttling*, 4 Am. Rep. 228, and note.—Rep.

McGOON *et al.*, appellants, v. SHIRK.

(54 Ill. 403.)

Promissory note — gold contract — legal tender act.

A promissory note executed subsequent to the passage of the legal tender act of congress of 1862, payable, in terms, in American gold, is not discharged by a tender of United States treasury notes.

BILL in chancery. The case is stated in the opinion.

David Sheenan, for appellants.

Oliver C. Gray and Small & Miller, for appellee.

BRESEE, J. The question presented by this record is, can a promissory note, payable, in terms, in American gold, be discharged by a tender of United States treasury notes, such promissory note having been executed subsequent to the passage of the act of February 25, 1862, called the legal tender act?

This court had occasion, so far back as 1864, to examine this question. The first case was that of *Hull v. Kohlsaat*, 36 Ill. 130, which was an action at law on a note of this tenor: "Six months after date, I promise to pay to Alfred Hull, or order, seventy-five dollars, with ten per cent interest, without defalcation, for value received, in American gold," and dated April 1, 1862. It was there held, the note was not specifically payable in American gold, but, if the words "in American gold" had immediately followed the word "dollars," in the note, then it might have been payable in American gold or its equivalent, but being connected with, and following immediately after, the words "value received," they relate to these latter words—they point out what was the value which the maker had received from the payee.

The next case was that of *Whetstone v. Colley*, 36 Ill. 328. There the note was as follows: "On or before the first day of March next, for value received, I promise to pay Thomas Colley \$150, with ten per cent interest from date, in gold. July 17, 1862."

This note was counted on as a contract to deliver 150 gold dollars, and interest, averring that these were of the value of \$500.

McGoon v. Shirk.

There was also a count on the note, as a promissory note, averring the value of the \$150 in gold, and interest, to have been \$500 at the maturity of the note. There was also a count in *indebitatus assumpsit* for gold sold and delivered; gold coin sold and delivered; bullion sold and delivered; money lent, and interest.

It was proved on the trial, that gold was loaned to the maker of the note, and that, at the date of the transaction, gold was at a premium of sixty-seven cents over United States legal tender notes.

On this evidence, the court assessed the damages of the plaintiff at \$235.50.

On appeal to this court, it was held, the court erred in the measure of damages, and that a judgment on a promissory note, payable in gold, in express terms, could be entered up for the face of the note, and interest, in dollars only, and that the value of gold over legal tender notes was not a subject for consideration in an action brought on such a note.

The next case was *Humphrey v. Clement*, 44 Ill. 299, in chancery, for the specific performance of a contract for the sale and conveyance of a tract of land, in which, by its tenor, the purchase-money was to be paid in gold.

It was held, the contract could be discharged by the payment of the price agreed upon in legal tender notes, and a specific performance was decreed, such notes having been tendered in performance.

These cases announced the view this court entertained and endeavored to enforce by such arguments as were deemed sound and applicable.

The record before us shows an application by the debtor party to chancery, to relieve him from paying a note, the consideration of which was American gold loaned to him by the appellant, on his written promise to pay the same in like coin, and to compel appellant to receive legal tender notes in discharge thereof.

On the authority of the cases cited, we should have been compelled to hold, the maker of the note had this right, and that he might come into a court of equity to enforce it. That a party who has placed an encumbrance upon his property, as in this case, by a deed of trust, may come into a court of equity to obtain the removal of the encumbrance, will not be denied; and so coming, he must have the principles of law, when they apply, administered to him.

Since the decision of these cases, the questions involved in them have been considered and determined by the supreme court of the

United States, in two cases, the conclusions in which are directly opposed to the views we have expressed in the cases cited.

The first case is *Bronson v. Rodes*, 7 Wallace, 229, and the other, *Butler v. Horwitz*, id. 258.

In the case first named, the contract was entered into previous to the passage of the legal tender act of February 25, 1862, and was for the payment of a certain sum in gold and silver coin, lawful money of the United States, and the question was, "Was Bronson bound by law to accept from Rodes United States notes equal in nominal amount to the sum due him, as full performance and satisfaction of a contract which stipulated for the payment of that sum in gold and silver coin, lawful money of the United States?"

This question was fully argued by the chief justice, in delivering the opinion of the majority of the court, and was answered by saying, that upon a reasonable construction of the legal tender act, compared with other acts of congress, it must be held to sustain the proposition, that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not "debts" which may be satisfied by the tender of United States notes.

In the subsequent case of *Butler v. Horwitz*, *supra*, which was an action upon a contract payable in gold and silver, entered into prior to the passage of the legal tender act, the majority of the court say, referring to the case of *Bronson v. Rodes*, *supra*, that under the existing laws of which, in respect to legal tender, the constitutionality is assumed, damages may be properly assessed and judgment rendered, so as to give full effect to the intention of parties as to the medium of payment, and when it appears to be the clear intent of a contract, that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly.

No distinction is made as to the time when such contracts may have been entered into. The intent of the parties is to govern, and if it clearly appears the intention was to pay in gold, the court will so enforce the contract.

In construing an act of congress, its force and effect, the supreme court of the United States is the highest and most authoritative tribunal known to our laws, and to which other courts habitually defer. Decisions of that court, on the meaning of an act of congress, must override those of the supreme court of a State on the

Candee, Swan & Co. v. Deere & Co.

same subject, and the decisions cited overrule those of this court in *Hull v. Kolsaat*, *Whetstone v. Colley*, and *Humphrey v. Clement*, *supra*, and must be regarded as declaring the law of this case. The note was payable in American gold, and in that medium alone, without the consent of the payee, could it be paid and satisfied. The court erred in holding the tender of treasury notes sufficient, and a compliance with the contract, and for this error the decree must be reversed. As the bill contains no equity, it must be dismissed, and appellant remitted to his rights under the deed of trust. Appellant will recover his costs.

Decree reversed.

CANDER, SWAN & Co., appellants, v. DEERE & Co.

(54 Ill. 439.)

Trade mark, what constitutes — infringement — name of place — letters and figures.

Any word or phrase used in circulars, price lists or advertisements to designate a manufactured article, but not placed upon the article, does not constitute a trade mark.

The use of a trade mark consisting of the words "Candee, Swan & Co.," in a semi-circular form above the words "Moline, Ill.," is no infringement upon a trade mark consisting of the words "John Deere," in a semi-circular form above the words "Moline, Ill."

The term "Moline" in "Moline plow" is generic, Moline being the name of the place where the plow is manufactured, and is not susceptible of exclusive use as a trade mark.

The combination of letters and figures, A No. 1, A X No. 1, No. 1, X No. 1, No. 3, and B No. 1, respectively, used originally for the purpose of designating the quality of manufactured articles, are not susceptible of exclusive use as a trade mark.

BILL in chancery for an injunction and an accounting. The facts are fully set forth in the opinion.

James Grant, C. Whitaker and Ira O. Wilkinson, for appellants, cited, *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. (S. C.) 599; *Stokes v. Landgraff*, 17 Barb. 608; *Pierce v. Franks*, 10 Jur. R. 25; *Williams v. Johnson*, 2 Bosw. 1; *Upton on Trade Marks*, 26, 98, 99; *The Collins Co. v. Cowen*, 3 Kay & Johns. 428; *Brooklyn White*

Candee, Swan & Co. v. Deere & Co.

Lead Co. v. Masury, 25 Barb. 418; *Howe v. Howe Machine Co.*, 50 id. 236; *Burgess v. Burgess*, 17 Eng. Law & Eq. 260; *Newman v. Alvord*, 49 Barb. 591; *Burnett v. Phalon*, 9 Bosw. 192; *Wolfe v. Goulard*, 18 How. Pr. 64; *Corwin v. Daly*, 7 Bosw. 222; *Bininger v. Wattles*, 28 How. 206; *Farina v. Silverlock*, 39 Eng. Law & Eq. 514; *Perry v. Truefit*, 6 Bea. 66; *Fetridge v. Wells*, 13 How. 385; *Partridge v. Menck*, 2 Barb. Ch. R. 101; *Pidding v. How*, 8 Simons, 477; *Town v. Stetson*, 5 Abb. (N. S.) 218; *Faber v. Faber*, 49 Barb. 357; *Rogers et al. v. Taintor*, 97 Mass. 291; Bouv. Law Dic. Trade Mark; *Singleton v. Bolten*, 3 Doug. 393; *Canham v. Jones*, 2 Ves. & Beames, 218; *Thomson v. Winchester*, 19 Pick. 214; Dan. Ch. Prac. 1754; *Eden on Injunc.* 226; *Newman v. Alvord*, 49 Barb. 588; *Wolfe v. Goulard*, 18 How. 64.

John B. Hawley and *George W. Pleasants*, for appellees, cited, *Upton on Trade Marks*, 26, 27, 47; *Corwin v. Daly*, 7 Bosw. 222; *Howe v. The Howe Machine Co.*, 50 Barb. 236; *Newman v. Alvord*, 49 id. 591; *The Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. R. 599; *Burgess v. Burgess*, 17 Eng. Law & Eq. 257; *Sykes v. Sykes*, 3 B. & C. 541; *Rodgers v. Nowill*, 5 Mann. Gr. & Scott (C. B.), 109; *Croft v. Day*, 7 Beavan. 84; *Williams v. Johnson*, 2 Bosw. 1; *Taylor v. Carpenter*, 2 Sandf. Ch. R. 603; *Coats v. Holbrook*, id. 586; *Clark v. Clark*, 25 Barb. 76; *Fetridge v. Wells*, 4 Abb. Pr. R. 144; *Upton on Trade Marks*, 97, 137, 138; *Brooklyn White Lead Co. v. Masury*, 25 Bosw. 416; *Burnett v. Phalon*, 9 Bosw. 197; *Bradley v. Norton*, 33 Conn. 165; *Collins v. Cowen*, 4 Kay & Johns. 428; *Stokes v. Landgraff*, 17 Barb. 608; *Millington v. Fox*, 3 My. L. & Cr. 338; *Crawshay v. Thompson*, 4 Mann. & Gr. 357; *Coffeen v. Brunton*, 4 McLean, 516; *Gout v. Aleplogu*, 6 Beav. 69; *Gillott v. Esterbrook*, 47 Barb. 455; *Messerole v. Tynberg*, 4 Abb. (N. S.) 410; *Town v. Stetson*, 5 id. 218; *Ames v. King*, 2 Gray, 379.

BREESE, J. This was a bill in chancery, exhibited in the Rock Island circuit court by John Deere and others, claiming to be manufacturers of plows at Moline, in this State, known by the trade and by the community, wherever sold and used, as the "Moline Plow," and against Candee, Swan & Co. other manufacturers of the same implement, at the same place. The object of the bill was to enjoin defendants from pirating their trade mark, to their injury, and from

Candee, Swan & Co. v. Deere & Co.

making, branding and selling their plows as the Moline plow, and for an account.

The bill alleges that complainants have, at great expense, and through the large experience, skill and ingenuity, and untiring energy and industry of John Deere, brought their plows to great perfection, and have been made acceptable to the public; that they are made of various qualities, sizes and patterns, and distinguished by different names, letters and numbers, originated and applied to them respectively and exclusively, and placed upon their plows by John Deere and his associates, that they are sold, used and known by the trade and community, wherever they are sold and used, as the "Moline Plow," and not by the name and style of the manufacturers, and are so advertised in newspapers, circulars, price lists and agricultural works and periodicals, and by their agents and others selling them, and that, upon all of their plows, there is branded or stenciled upon the sides of the beam, under the names of the manufacturers, or some one of them, which differed at different times, in a straight horizontal line, and in plain capital letters, the words "Moline, Ill.;" that, by this name, the Moline plow has acquired a national reputation, and is in great favor, and commands a ready sale at a fair profit. It is further alleged, that until the last year, no other plows than those manufactured by complainants, were ever branded, stenciled, advertised, sold, used, or in any manner known as the "Moline Plow," nor until the last year was there any other plow factory at Moline than that with which John Deere has been connected; and complaints say that they have succeeded to all the rights that ever pertained to John Deere and his associates in this manufacture and business, and hoped they might continue to have and enjoy the benefits and advantages of the reputation so acquired, and of the name and trade marks so given and used, exclusively, and without molestation. The bill then charges, that the defendants, sometime in 1866, commenced the business of manufacturing plows at Moline, and envying the reputation of the plows made by complainants, and their business and prosperity based thereon, and wrongfully intending and fraudulently contriving to take advantage of the same, to their own profit, and to the injury of complainants in their business, and of their agents and customers, and to deceive and impose upon the community in that behalf, have hitherto, and are now, manufacturing plows of different sizes and patterns, as near like those manufactured and sold by com-

plainants in size, pattern and finish, as they could or can, and have branded and stenciled them on the sides of the beams, under the name of Candee, Swan & Co. in a straight horizontal line, and in plain capital letters, the words "Moline, Ill." in all respects as the same are branded or stenciled on complainants' plows, and have advertised them in their circulars and price lists as the "Moline Plow," precisely as those manufactured by complainants, and distinguish the different sizes and patterns of the plows of their make, corresponding with those of complainants, and advertise them to the trade and community by the same names, letters and numbers, respectively, as complainants; complainants then show their trade circular or price list, used and circulated by them since its date, viz., July 1, 1866, and also make an exhibit of defendants' trade circular or price list, dated August 1, 1866, and charge that it was fraudulently intended by defendants, through its similarity in general, and in detail, to that published by complainants, to deceive buyers, and to affix to defendants' manufacture the reputation earned and long enjoyed by complainants, and thereby secure a sale as ready and profitable as complainants' plows have met with, and this to the injury of complainants; and they charge that defendants, by this wrongful and fraudulent imitation and use of the trade marks of complainants, have already greatly injured them in their business, and are preparing further to injure them in the same way.

The prayer is for an answer, not under oath, and for an injunction "wholly enjoining and restraining defendants from advertising, using or imitating the trade marks, names, letters, numbers, figures, and words of complainants, or any or either of them, or from advertising, representing, or in any manner calling or designating the plows, or any of them, manufactured by defendants, the 'Moline Plow,' and from branding, stenciling, or in any manner marking or placing thereon the words 'Moline, Ill.' in imitation of those words as placed on complainants' plows, or otherwise." They also pray that an account may be taken of the amount of damages sustained by complainants, by means of these several wrongful acts of the defendants, and for general relief.

The defendants put in a joint and several answer to the bill, in which they allege that Moline, prior to the advent of John Deere, was a manufacturing town, where various kinds of manufacture were then made; that contemporaneous with Deere's coming to the

Candee, Swan & Co. v. Deere & Co.

place, and commenced making plows, there were two plow makers there, namely: one Berry and one Kinsey, whose plows were known as the "Moline plows," and were marked, branded or stenciled with the maker's name, in a circular form, on the beam, and "Moline, Ill." in a straight line underneath; that among the traue, and with people who buy and sell them, all the manufactures of Moline pass by the name of Moline, as Moline plows, Moline buckets, tubs and pails, Moline fanning-mills, Moline pumps, etc., and was so done before John Deere came to the place; but that no manufacturer has ever undertaken to assume to himself or his business the name of "Moline, Ill." as a trade mark; that the name of the town has been always used, and now is used, by all its manufacturers, not as a trade mark, but to show the place where the article was made; that when Deere came to Moline and made plows in company with Tate, they made a plow called by the public the "Grand De Tour Plow;" that Berry's plows were called the "Moline Plow," a part of which Deere and Tate adopted, that is, the wrought iron land side.

They deny that it is through the skill of John Deere and his energy the plow has been improved, or that it is preferable to those manufactured at other establishments, and that the improvements made in the name of Deere are due to the skill, experience and ingenuity of Robert Tate and one of the defendants, Fryberg; they deny that Deere originated the system of numbers and letters and names placed on their plows, and insist that they are used to designate particular qualities of goods, and that it has been common to all manufacturers; that the term "clipper," as applied to a plow, was borrowed by Deere and Tate from a plow brought to Moline by one Wheelock, made by Price, of Chicago; that the numbers A 1 X 1, etc., marked on Deere's plows, are so marked to designate their quality, and were borrowed by him, and copied by Mr. Hemmenway for him, from the price list of Ruggles, Nourse & Mason, plow makers in Worcester, Massachusetts; and they deny that all complainants' plows have been, or are, sold and used as the "Moline Plow," and not by the name and style of the respective manufactures; they allege that neither Deere and Tate, nor John Deere, nor Deere & Co., ever branded, stenciled, advertised or sold any of their plows as the "Moline Plow," or as a "Moline Plow," until after defendants began the manufacture in Moline; and they deny that John Deere, as the successor of Deere & Tate, or Deere & Co., as the successors of John Deere, ever acquired any right to any

trade mark for their plows, or ever used or claimed one until after defendants began their operations in Moline, or ever held themselves out to the public as being the purchasers of any such right, nor did any one of the complainants claim the name of the town of "Moline, Ill.," as their trade mark, or any other trade mark, until after defendants commenced their business. They deny all intention to do complainants any wrong, or to deceive or impose upon the community by their manufacture of plows. Defendants claim great credit for Andrew Fryberg, one of the firm of "Candee, Swan & Co.," while he was in the service of Deere, as having suggested many of the improvements for which John Deere has the credit. They admit they advertise and sell certain plows of different sizes and patterns, like those advertised by complainants, but, in their opinion, better plows, and with improvements of their own invention, of great utility, rendering them superior to those of complainants, and they admit they do brand and stencil their plows on the beam with the name of "Candee, Swan & Co., Moline, Ill.," in the same place and form as the name "John Deere, Moline, Ill.," is branded on the plows made by them, and they admit that they have advertised their plows in circulars and price lists, and caused them to be extensively known, with improvements of their own, as a Moline plow, and made in the same form as the plows made at Moline by John Deere, or Deere & Co., and in their circulars have added a clause as follows: "We feel warranted in saying that the reputation of the 'Moline Plows' will not suffer at our hands. Our Mr. Fryberg, for twelve years, had charge of the iron department of Mr. Deere's shop, and to his skill as a mechanic, they, in a great measure, owe their justly merited prosperity. We ask a careful examination and comparison of our plows with other 'Moline plows,' and would respectfully solicit patronage." They further say, that this form of branding the name of the maker in a circular form, and the place where made in a straight line underneath, was common among plow makers before John Deere made plows; that the plow from which Deere & Tate copied their plow, was first made by a man in Princeton, improved by a man in Galesburg, improved on his by Robert Tate, Deere's partner, and improved by Fryberg, the forman of Deere, and that plow was branded in the same way. They admit the use of the same names, letters and numbers, to designate the quality and size of their plows, as the complainants use; that complainants borrowed them from other

Candee, Swan & Co. v. Deere & Co.

plow makers; that they are not used as a trade mark, or to induce a belief that defendants' plows are made by complainants.

In accounting for the similarity of their circulars with complainants', they say that complainants' was issued July 1, 1866, and theirs on August 1, thereafter; they were both at the same printing office, and the printer put them in like form; that Deere and Co. took to the printer the price list of a Peoria factory, and required their circular to be of like form to the Peoria list; and they aver that their price list distinctly declares that they make and sell their own plows, put their own names on them, and challenge competition with the manufacture of complainants, and they deny any intention wrongfully to use any trade mark or marks of complainants, or that they have been, or will be, injured thereby. They, further averring, say that in a circular issued by complainants, in December, 1866, they, for the first time, claimed a trade mark, and that the trade mark was "John Deere, Moline, Ill.," not the "Moline Plow;" that such a trade mark as the "Moline Plow" was never claimed by any circular, hand bill, price list, or advertisement, or brand on their plow, before the defendants issued their circular and branded their plows. The defendants, in conclusion, say that complainants have neither a patent, invention nor monopoly upon the plows made by them, on which they use certain names, letters and numbers, to designate the quality of their plows, and on which they brand on the beam, in circular form, like other plow makers, in the same place, form and size, the name of "John Deere," with the place, "Moline, Ill.," in a straight line underneath; that they, the defendants, make similar plows, and lawfully use similar names, letters and numbers to designate their quality, and brand their plows with the name of "Candee, Swan & Co.," in a circular form on the beam, with the words "Moline, Ill.," in a straight line underneath, as they lawfully may, and sell them as "Moline, Ill.," plows, made by them, and not by Deere & Co.

A replication was put in to the answer, and much testimony taken by deposition, and many exhibits produced, and the cause fully heard, and a decree pronounced, of which the following is the substance:

And the court, being now fully advised in the premises, doth find that the complainants' said bill of complaint, and the matters and things therein contained, are true; and the said complainants are entitled to the exclusive use, as a trade mark, in the manufac-

ture and sale of plows, of the words "Moline Plow," and also to the various letters, figures, numbers and combinations, as used and applied by complainants, and as set forth and contained in "Exhibit A," attached to complainants' said bill, and used by complainants to designate the various sizes, shapes and patterns of plows manufactured and sold by them.

It is, therefore, ordered, adjudged and decreed, by the court, that the said defendants, and each and every of them, their agents and servants, be forever restrained and enjoined from in any way calling or advertising themselves as "The Moline Plow Company," or "Moline Plow Co." or similar words, and from advertising, calling, selling or placing upon the plows made, or to be made, by them, or any or either of them, the name of "The Moline Plow," or "Moline Plow," or "Moline Plows," or other words or names in imitation of the said trade mark of said complainants, or any part thereof, or in any way or manner using the word "Moline," either upon their plows or in advertising the same, as in any way designating, pointing out or indicating the manufacture of defendants, or in any other way, except in connection with such word or words as shall, and shall only, point out and designate the place where the defendants manufacture plows.

And that they also be forever restrained and enjoined from in any manner imitating said complainants in advertising, selling, using or placing upon any plow or plows manufactured, or to be manufactured, by said defendants, or any or either of them, any of the letters, numbers, or figures, or combinations, as set forth and contained in complainants' "Exhibit A," attached to the bill of complaint herein, and placed upon the various plows manufactured and sold by the complainants, and by which they are advertised and sold by them, and used and applied by them to indicate the various sizes, shapes and patterns of such plows; and that they and each and every of them, be forever restrained and enjoined from branding, stenciling or otherwise placing upon the plows made, or to be made by them, or any or either of them, the words "Candee, Swan & Co." or other words, in a circular form, in imitation of the complainants' brand, upon the beam of any such plow or plows, over the words Moline, Illinois, or any abbreviation of such words, or either thereof.

It is further ordered that defendants pay the costs of this suit.

To reverse this decree, the defendants appeal.

Candee, Swan & Co. v. Deere & Co.

We have been thus particular in setting out this case, as it is *novus hospes* in this court, and is confessedly one of very great importance, not to these parties litigant only, but to the whole community. The case itself has been most elaborately prepared and ably argued, and has received all the consideration we are capable of bestowing upon it. We have examined the testimony, voluminous as it is, and consulted all the cases to which reference has been made, on both sides, and are prepared to announce the conclusions we have reached.

As preliminary, it will be well to state, that the principal complainant in the bill, John Deere, who is acknowledged to be, in fact, the head of the concern, first commenced the manufacture of plows as early as 1838 or 1839, at a small village called Grand De Tour, on Rock river, and was then associated in business with one Andrews. It was carried on successfully for several years, and the "Grand De Tour" plow became known and appreciated far and near. This place not possessing all the necessary advantages, or affording "scope and verge enough" for the active energies of Deere, he removed, in 1848, to Moline, at the head of the upper rapids of the Mississippi river, even then favored by an abundant water power, and in a region of country unsurpassed for beauty and fertility. He found the field there comparatively unoccupied; no workmen in plows there but Cyrus Kinsey and Daniel P. Berry, in a small way, both of whom were soon absorbed by Deere, and both abandoned their own shops to labor for him. Soon a partnership was formed between Deere and Robert N. Tate and John M. Gould, in the manufacture of plows, on quite a large scale for that day, and in that locality. Afterward, Charles Atkinson was taken into the firm, and the firm name was Deere, Tate & Co. Soon he retired and Mr. Gould also, and the firm name was changed to that of Deere & Tate. But, whoever composed the firm, John Deere was the head, and by his energy, and industry, and perseverance, he brought the business up from one requiring, at the commencement, ten or fifteen hands, to one requiring now 100 or more, and his manufactures sell all over the country. In fact, Deere and his associates, whoever they may have been, have enjoyed for more than twenty years the monopoly in this manufacture, at this favored locality.

The works under his management have greatly prospered, and the machine so indispensable to our prosperity has been greatly.

improved by him; not, perhaps, by applying original conceptions of his own mind to any part of it, but by careful study of the labors of others, and, with unerring judgment, adapting them to his own. Thus, in his early advent to Moline, he took from Berry the idea of a wrought iron land side, the use of which has proved to be superior to the one of cast iron which he was constantly using; so he obtained the shape of the mould board from May's "Diamond" plow, and used steel for the same, because it was on other plows, and had the preference over any other material which he was using. He did not hesitate to adopt the shape of the beam in use by Ruggles, Nourse & Mason, of Worcester, Massachusetts, and the idea of numbers and figures to designate quality, shape and workmanship from the same. The name he bestowed upon one of his favorite plows was applied to a plow made in Chicago, and sold by Wheelock to Deere, called the "Clipper."

In short, no apparent improvement was unnoticed by him, and he was not slow to apply them all to his own manufacture, and thus incorporate them.

Mr. Tate, the former partner of Deere, and, we should judge from his testimony, a man of observation, some mechanical skill, and well informed, generally, and particularly upon the subject of plows, says the history of this plow goes back to 1841. A person by the name of Hitchcock commenced what he called the Diamond plow, in Princeton, Bureau county. Afterwards, May, of Galesburg, manufactured a plow in shape nearly the form that is manufactured now. This is the earliest he recollects of seeing a steel mould board. The share and mould board were combined at that time, and May was the first man who laid any claim to the improved steel plow. There is no improvement on the May steel plow as made in 1843, or later, perhaps, up to this time. The plows afterwards made at Palestine, in Lee county, by a person named Doan; afterwards at Grand De Tour by W. Denney and Deere and Andrews; afterwards in Moline by Deere, Tate and Gould in the fall of 1848; afterwards by Buford and Tate in 1856—the working models are all copied strictly after the May plows. While at Grand De Tour we borrowed the May plow and copied its improvements in 1847. I essentially consider May the sole constructor, in form, of the Western steel plow. Connected with the Moline plow there is nothing original. The beam and handle are essentially the beam and handle used by Ruggles, Nourse & Mason. The cast

block intended to give form to the mould board we copied from the Evans plow, of Galena. The clevis we purchased as made in the east, by Warner, for Ruggles, Nourse & Mason and others. We introduced then what we called the muley share, which we copied from the "Occidental," a plow brought to Moline. We applied the muley share to one plow in Moline in the spring of 1850.

The testimony of this witness, as well as that of others, tends to show that Deere was not the inventor of any material part of his plow, and that his great recommendation and praise is, that he had the sagacity to discern to what profitable use the inventions of others could be applied, and by a well directed judgment he has constructed a plow not inferior to any in use in our wide-spread agricultural community, all which entitles him to as much credit as if an original inventor.

But the question arises, has he secured a trade mark for his plow, the pirating of which to his injury is deemed unlawful? To decide this question, we must first understand what is meant and intended by a "trade mark," and how it is to be known. There are but few elementary treatises on this subject. That a trade mark is a legal possession has been recognized by courts for many years, but its protection by courts of equity is of quite modern origin. A trade mark is defined in Bouvier's Law Dictionary, to be a symbol, emblem or mark which a tradesman puts upon, or wraps or attaches in some way to the goods he manufactures, or has caused to be manufactured. It may be in any form of letters, words, vignettes or ornamental designs.

Upton, in his treatise, and it is the only one we have seen upon the subject, says, a trade mark is the name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise. Upton on Trade Marks, ch. 1. p. 9.

Assuming these as the proper definition, what portion of them can one claim as his trade mark, and can he have more than one, and must not that to which he lays claim be so clear and well defined, and the right asserted to it, in the same shape and form always, under all circumstances, as to give him an exclusive right,

and must it not be in some way attached to the article manufactured so that it shall be exhibited in its whole extent?

A trade mark is similar in some respects to the marks or brands owners of live stock which run at large put upon each one of them. The object of the one is, to distinguish the property bearing it from that of another. In respect to cattle and swine, it is well known there is great similarity between those of different owners, in color, make, flesh marks and general appearance. The mark or brand usually decides the question of ownership, should a dispute arise thereon. A trade mark denotes the origin of the article. No one man can have more than one mark or brand, and it is required to be recorded. If the owner could have more than one mark by which to distinguish his property, great confusion and uncertainty would be produced, to such an extent as to defeat the object in view. We have found no case where a proprietor has claimed more than one trade mark, and all concur in saying that the mark must be so clear and well defined as to give notice to others, and must not be deviated from at the suggestion of whim or caprice. That it must be attached to the article manufactured, in such a way as to be reasonably durable and visible, is also conceded. It must have a practical existence, not resting in the thought of the owner, but stamped or impressed or attached in some way to the article itself. Our common observation of such articles sold in the shops teaches this, and it is so reasonable as to claim the acquiescence of every one. Of what use is such a mark unless it be visible, and thus operate as a notice to the public? We can perceive none.

It is understood that the published declarations of a manufacturer, that he has adopted a certain word as his trade mark, can lay the foundation, or even aid in laying the foundation, of a right of property in the word, cannot be reconciled with recognized principles upon which such property can be acquired, or with the policy of the law in recognizing and protecting the acquisition. It is the *actual use* of the trade mark affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. The mere declaration of a person, however long, and however extensively published, that he claims property in a word as his trade mark, cannot even tend to make it his property. Upton on Trade Marks, 179.

With these preliminary remarks, we will consider, what do the complainants claim in their bill as their trade mark?

If we comprehend the allegations in the bill on this head, they claim the words "Moline, Ill.," stenciled on the side of the beams of their plows, in a straight horizontal line, as their trade mark, and this under the names of the manufacturers, or some one of them. Complainants then aver that said plows, by their said name of "Moline Plow," have acquired a national reputation, and no plow was sold as the "Moline Plow" by others than complainants, until defendants commenced their manufacture at the same place in 1866, and the complaint is, that they stencil on the beams of their plows, in a straight horizontal line, in plain capital letters, the words "Moline, Ill.," underneath their own names as manufacturers, and sell them as the "Moline Plow."

Complainants refer to their circular, exhibit A. to sustain their allegations. That is headed, "Circular." "Deere & Co.'s Moline Plow Factory," in German text, or old English, and in the body of it the public are informed that Deere's Moline Plows have, for many years, enjoyed the reputation of being the best plows in the west, etc. This circular is dated Moline, Ill., Sept., 1859, and signed Deere & Co. There is no claim in this of any trade mark.

In appellee's argument, their trade mark, or what is claimed as such, is copied in *fac simile*, except as to the size of the letters, and that mark is, "John Deere," in the segment of a circle, and the words "Moline, Ill.," in a straight horizontal line underneath, with a dash between them. Their whole argument claims that these words, so arranged, and in this combination, are the trade mark, if any they have, not the words "Moline, Ill.," not the words "Moline Plow," but the words as arranged in the copy given by their counsel.

Appellees argue that their name and address upon their plows is a proper trade mark, pure and simple; that it indicates by whom and where the article is manufactured, nothing more, nothing less and nothing else, and so fulfills most completely all the conditions of the law.

This we consider an abandonment of any claim to the words "Moline, Ill.," or the words "Moline Plow," as their trade mark, and the mark being a trade mark by being placed on the beam, is a virtual disclaimer of all right to any other, claimed in circulars and price lists. The question is, then, narrowed down to this: Can one manufacturer of an article at a particular town, whose wares have gained celebrity, appropriate as his own, to the exclusion of every

other person in the same place, the name of the place, and thus prevent him from designating his manufactures, as of the place where they are actually made? We do not think the cases go to this extent. Though, as Upton says, the simplest case of a trade mark fulfilling the condition of the law, and thereby entitling him who adopts it to protection in its exclusive use, is the name and address of the manufacturer. P. 102. In such a case, no question as to right to exclusive use can arise. But it must be observed that such trade mark has two constituents; the name of the manufacturer, and the place of his operations or address. Neither, singly, will suffice to be effectual for protection; both must be used. Had appellants adopted this trade mark, or so simulated it as to deceive the public, and with that intent, an injunction might be proper. How is the proof on this point? An exhibit is made of the marks of these parties, as branded or stenciled on the beams. The one is "John Deere," in large, heavy capitals in black paint, on the segment of a circle, with the words "Moline, Ill.," in a straight horizontal line underneath, in smaller capitals in like black paint, with a dash or flourish between them. The name of appellants is in smaller capital letters, on a segment of a circle at least two inches longer than that of "John Deere, and the address, "Moline, Ill.," in smaller capital letters, on a straight horizontal line, and a dash between them. There is, it is true, a resemblance between these marks, as there necessarily must be, the same lines being used, and the same color of paint, but the names of the respective manufacturers are so different, and the space occupied by appellants' names so much longer than that occupied by the name of appellees, as to attract the notice of the most casual observer, drawn to it as it would be by the heavier body and larger size of the letters of the name "John Deere," and the names themselves being so very different. No person of ordinary observation could suppose, in looking at appellants' brand, that it was designed to palm off their manufacture as that of John Deere, when it told them, as plain as letters and words can speak, that it was not made by John Deere, or by appellees. Upton, in discussing what is a violation of a trade mark, says, when A adopts or imitates and applies to articles of his manufacture, the name or mark previously used by B as a designation for his productions, the wrong consists in the sale by A of his goods as and for the goods of B. The doctrine is clearly recognized, that no man can have a right to represent his goods as the goods of

another, and in many of the cases coming under our notice, it was shown that the party complained of, was selling his manufacture as the manufacture of another. Nothing of that kind is pretended in this case. In the circular of appellants, they distinctly announce that they are not the plows made by appellees, but are "Moline Plows," and claim an examination and comparison with other "Moline Plows," and the testimony shows that on no occasion, and to no person engaged in the trade, were their plows represented to be the workmanship of appellees. They claimed to such that they were "Moline Plows," but superior to the Deere plow, and there is no proof that they are inferior.

Were appellants violating any right of appellees in so representing them?

It is in proof the plows manufactured at Moline by Kinsey, were branded "Moline, Ill.," and those made by Berry, in the same manner, and that various articles manufactured at that place are so branded. The words have acquired a generic meaning, and one manufacturer at Moline has the same right to use them that any other manufacturer there has. A case illustrative of this idea is found in 19 Pick. 214, the case of *Thompson v. Winchester*, where it was held, that if the defendant made and sold medicines, calling them "Thomsonian," as a generic term, designating their general character, but did not offer to sell them, nor consign them to others to sell, as and for medicines made and prepared by the plaintiff, and if he made and compounded such medicines of bad materials with inadequate skill, by means whereof the credit and character of all Thomsonian medicines were brought into disrepute, the plaintiff could recover no damage; no infringement of plaintiff's right is shown.

Appellees have no patent upon any portion of their plows; any one, therefore, has a perfect right to make plows in their exact similitude, even to "the curve of the mould board" and "the tip of the handles;" in the minutest, as well as in the most important points; all have a right to manufacture them, no matter where the maker may reside, and has the right to put the name of the place where manufactured, as well as his own name, on such part of the plow as he pleases, taking care, however, so to use the brand as not to deceive the public, so as not to create a belief that the plow is the manufacture of another.

In appellees' bill they claim the words "Moline, Ill.," and "Moline

Plow," as words to which they have an exclusive right when used to designate plows, and so the circuit court must have understood it, for the very language of the finding is, that the complainants' bill is true, and that they are entitled to the exclusive use, as a trade mark, in the manufacture and sale of plows, of the words "Moline Plow," also to the various letters, figures, numbers and combinations, as used and applied by them, as set forth and contained in exhibit A, attached to their bill, and used by them to designate the various sizes, shapes and patterns of plows manufactured and sold by them.

The decree is still more comprehensive. It is decreed that the defendants, and each of them, their agents and servants, be forever restrained and enjoined in any way calling or advertising themselves as "The Moline Plow Company," or, "Moline Plow Co.," or similar words, and from advertising, calling, selling, or placing upon the plows made, or to be made by them, or any or either of them, the name of "The Moline Plow," or "Moline Plow," or "Moline Plows," or other words or names, in imitation of the said trade mark of said complainants, or any part thereof, or in any way or manner using the word "Moline," either upon their plows or in advertising the same, as in any way designating, pointing out or indicating the manufacture of defendants, or in any other way, except in connection with such word or words as shall, and shall only, point out and designate the place where the defendants manufacture plows.

The decree further enjoins appellants from using, or placing upon their plows, any of the letters, numbers, or figures, or combinations, like those placed upon complainants' plows, and used by them to indicate the various sizes, shapes and patterns of such plows; and they are further enjoined from branding, stenciling, or otherwise placing upon their plows, the words "Candee, Swan & Co.," or other words, in a circular form, in imitation of the complainants' brand, upon the beam of any such plow or plows, over the words Moline, Illinois, or any abbreviation of such words, or either thereof.

We are not mistaken, therefore, when we say that the trade mark claimed by this bill, and found by the court, is the words "Moline Plow," to which they are entitled to the exclusive use, and not the words "John Deere," on the segment of a circle, with "Moline, Ill.," on a straight horizontal line underneath. The finding and decree follow the bill, and show the same case.

If this, then, be the trade mark, it is of no value, as it has never

been affixed by appellees to any plow they have manufactured, or attached to it in any way, and if they had so done, there is not a particle of proof appellants have affixed it to any plow of their manufacture. The law is well settled that no circular, price list or advertisement, no matter how frequently repeated, can constitute a trade mark, and it is only in that way appellees have used, and appellants also using it as a generic term, which they had a clear right to do. Is it possible, can it be tolerated for a single moment, that a maker of plows at Moline shall not be permitted to sell his work as a Moline plow; to advertise them in every form as the Moline plow? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world, where his wares are made? In what could a contrary notion result, but in a monstrous monopoly? If, to the exactions committed upon the agricultural portion of our people by the patentees of reapers and mowers, implements now indispensable, there shall be superadded a monopoly in the manufacture and sale of the plow, at a point so important as Moline, how shall the farmers bear this grievous and oppressive burden? Shall it be said that because appellants have branded their pumps; which, it appears by the testimony, they manufacture—"Moline, Ill.," no other manufacturer of pumps at that place shall so brand his? Shall it be said that any man, or association of men, can so appropriate the name of a town where manufactures can be carried on in the most extensive manner, and on a gigantic scale, such will be her increased facilities by the expenditure by the government of large sums of money to that end? Monopolies are odious, against which the public sentiment has ever revolted, and what can be more odious and oppressive than the monopoly of the manufacture and sale of plows? If it can be claimed by an association at Moline, it could also be claimed for Peru, Peoria, Chicago, and the various other places at which these implements are largely made.

In a very recent English case, reported in the Albany Law Journal of February 25, 1871, the plaintiffs had been, for many years, manufacturers of starch, at a small hamlet in Scotland called Glenfield, where, it was said, a stream of water particularly suited for making that article flowed. Under the name of "Glenfield Starch," their goods had acquired a great reputation. In 1868, the defendants set up starch works at Glenfield, and sold starch in packets labeled "C. & Co., Starch Manufacturers, Glenfield." In

color alone those labels resembled those of the plaintiffs, but it was shown that the colors selected were common to almost all starch makers. Held, on bill filed for an injunction, that the defendants were entitled to manufacture starch at Glenfield, and doing so, to describe their goods as made there, and themselves, of that place; that even if they had chosen that place for their works, expressly because the name had become known in the markets, and with the intention of introducing that name as part of the description of themselves and their goods, it was open to them to do so, and, therefore, as the labels and inscriptions in no way imitated those of the plaintiffs, an injunction originally granted by *MALINS, V. C.*, was, on appeal, dissolved. *Witherspoon v. Currie*, Ch. 33, L. T. R. (Law Term Reports), 443; Vol. 3, No. 8 Law Journal, p. 156.

This case is noticed under the article "Trade Marks," and bears upon the case before us. What is to be understood by the closing paragraph is, that starch being put up for market in packages, are labeled in such a way as to constitute a trade mark, and as the defendants' labels did not imitate those of the plaintiffs', except in color, as stated before, there could be no piracy of the trade mark, that did not consist in the word "Glenfield." So in this case, if the trade mark of appellees is as charged in the bill, and as found by the court, there has been no piracy, and the same reasons that induced competition in the manufacture of starch at "Glenfield, that starch made there had a great reputation, and that defendants had a right to select that place on that account, because the name had become known in the market; so here, appellants were justified in commencing their operations at Moline, because the plows manufactured at that place had obtained a great reputation through the exertions of appellees, or of their head, Mr. Deere. Any number of plow makers can go with impunity to Moline and establish there plow factories, and brand on their plows their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers and to the common benefit of all.

But the court went, in their decree, to the full extent of the claim of appellees, and decided they had a property in the letters, figures and numbers placed on their plows, with this modification: Whereas, it is charged in the bill, that the plows manufactured by complainants have been of various qualities, sizes and patterns, for different qualities and conditions of soil, and for different operations, and distinguished by different names, letters and numbers;

and further, referring to exhibit A, their plows are spoken of as of different qualities, sizes and patterns, the court find they are used to designate the various sizes, shapes and patterns of plows.

It is in proof by two of appellees' witnesses, G. W. Vinton, one of the appellees, and C. G. Bryant, that they designated the different sizes, *qualities* and patterns by numbers, from one to nine, inclusive, put on the top of the beam, next to the standard; and as they modified them from time to time to suit the demand, they added numbers and portions of numbers. He also says, "the same letters, figures and numbers appear on defendants' plows, corresponding with those we use, and they appear in the same form, style and appearance, and designate the same style and *quality* of plows as our own." On cross-examination, he says these letters and numbers denote the size, quality, shape and brand of the plows.

Charles G. Bryant says he is familiar with Deere's numbers and figures and combinations, as applied to their plows, and they designate the size, shape and *quality* of the various kinds of plows on their price list, to which they are applied. And, on cross-examination, he says makers of plows generally mark them with letters and numbers, or combinations of letters and numbers, to denote the size, shape and *quality* of plows made by them.

That one cannot have a property in letters, figures and words used for such purpose, seems to be settled by the authorities.

It was held, in the case of *Stokes v. Landgraff*, 17 Barb. 608, referring to *Amoskeag Manufac. Co. v. Spear*, 2 Sandf. S. C. R. 599, in respect to words or devices which do not denote the goods or property, or particular place of business of a person, but only the nature, kind or quality of the article in which he deals, a different rule prevails; no property in such words, marks or devices can be acquired. There is, obviously, no good reason why one person should have any better right to use them than another. They may be used by many different persons at the same time, in their brands, marks or labels on their respective goods, with perfect truth and fairness. They signify nothing, when fairly interpreted, by which any dealer in a similar article could be defrauded.

The case of *The Amoskeag Manufac. Co. v. Spear*, *supra*, is said to be the leading American case on the question of trade marks; and in that it was held, that although, by the long continued use of certain words, letters, marks or symbols, which do not, of themselves, and were not designed to indicate the origin or ownership

of the goods to which they are affixed, the goods so marked, and because so marked, have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols, or the intent with which they were first used, as denoting the name of the thing, or its general or relative quality, or take from others the right to employ them in the same sense.

This portion of the claim set up by appellees must fall to the ground, as well as the claim based upon the use of the word "Moline," used to designate appellants' plows. It is very apparent, from the whole tenor of appellees' bills, their claim is founded on the fact, that their plows were sold by them as the "Moline plow," and not by the name of the manufacturer; and as that is only a generic term, it is seen they can claim no exclusive right to the use of that name by which to designate their manufacture. *Thompson v. Winchester*, *supra*, and to which citation should be added *Singleton v. Bolton*, 3 Doug. 298; *Compton v. Jones*, 2 Vesey & Beames, 218, and *Perry v. Troffit*, 6 Beavan, 66. These cases are all decided on the principle that the names used in the respective cases had become generic—merely descriptive of the kind or quality of the articles to which they were respectively applied, without reference to any particular manufacturer.

Suppose the law required each person claiming a trade mark, to record the same, how would that of appellees appear on the record? If, by these letters and figures, or a combination of them, the law is settled, they are no basis for the claim; if the words "Moline Plows," the law is equally well settled, that no exclusive right can be had in them; if in the form presented by the counsel for appellees in their brief, "John Deere," inscribed on the segment of a circle, and the words "Moline, Ill.," in a straight horizontal line underneath, it is not so claimed in the bill, and if it was, there is no proof that such trade mark has been violated by appellants.

But it seems to us, it is not quite clear what appellees intend is, and shall be, their trade mark. It is not made out to our satisfaction, and we believe the rule to be, in such cases, the proof must be clear, leaving the question beyond a reasonable doubt.

It is not possible for us, even if it were necessary, as it is not, to review the many cases cited on the argument. There is not entire harmony in them, but one of the most important principles deducible from them is, that when a trade mark is violated, the

essence of the wrong done consists in the sale of the goods of one manufacturer, as and for the goods of another, and, therefore, that such violation can only be predicated of a copy or imitation of a trade mark, or those portions of a trade mark which truly designate the origin or ownership of the goods; and another is, that a similarity between two trade marks used by different manufacturers for their goods, although of such a character as to induce a belief in the mind of the public that they belong to and designate the goods of the same manufacturer or trader, is not, of itself, sufficient ground for a prohibition of the use of such trade mark by him who did not first adopt it. That similarity, to entitle the originator to the protection of the law, must be such as to amount to a false representation, not alone that the two articles have the same origin, but that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the trade mark. *Amoskeag Manufac. Co. v. Spear, supra*; Upton on Trade Marks, 136.

Testing this case by these principles, it has no foundation. On the part of appellants, the essence of the wrong alleged to be done, is absent, and though a similarity may exist in the mark or brand of appellants, with that of appellees, if the words "John Deere," printed in capital letters on the segment of a circle, with the name of "Moline, Ill.," on a straight horizontal line, also in capital letters, be their trade mark, which is not so alleged in the bill, or proved, or found by the court, it is not such as to amount to a false representation, that the goods of appellants, bearing the brand, had the same origin, and were of the manufacture of appellees, if they did in fact first appropriate it as a trade mark.

On this point there is no evidence whatever. There was no pretension by appellees of a trade mark, until appellants commenced to manufacture, and that successfully, plows at Moline, and which they published far and wide as the "Moline Plow," and thus interfered with the monopoly appellees had created. For their audacity, in so interfering, the sternest decrees of the law are invoked, but in this court, the invocation will be vain on such facts as are presented by this record.

We forbear any discussion of the questions presented by the supplemental bill, deeming it unnecessary; satisfied, as we are, that appellees have no standing in a court of equity, and for the same reason decline the discussion of the question, how far claimants

Kerr v. Forgue.

under Deere may be protected in any trade mark he may have had and used.

Entertaining the views herein expressed, the decree of the circuit court must be reversed, the injunction dissolved and the bill dismissed.

Decree reversed.

KERR, appellant, v. FORGUE.

(54 Ill. 482.)

Negligence, comparative — minor — measure of damages.

In an action to recover for injuries received by the son of plaintiff in consequence of the alleged negligence of defendant in placing barrels and a counter on a public street, it appeared that the son was twelve years old, and that in passing on the sidewalk, he put his hands upon the counter, as if to jump upon it, when it fell and fractured his leg. *Held* (1), that the age and discretion of the boy were subjects of consideration by the jury; (2), that, as the negligence of defendant was much greater than that of the boy, plaintiff could recover; and (3), that evidence tending to show permanent injury, as affecting the amount of damages, was properly submitted to the jury.

ACTION on the case, commenced by appellee against appellant, for negligence in placing counters and barrels on the public street, by means whereof the son of appellee was injured. A trial by jury was had below, and plaintiff recovered a verdict for fifty dollars.

The proof shows that appellant, prior to the injury, had placed upon the sidewalk, in Kankakee City, a number of barrels and counters, in a tottering condition, and occupying a considerable portion of the walk; that one of the counters was eighteen or twenty feet in length, and that these obstructions interfered with a safe passage at night.

The son was, at the time of the injury, about twelve years old, lived with, and worked for, his father, and was worth from fifty to seventy-five cents per day, and at the time of the injury was going from his work to dinner. In passing he put his hands upon the counter, apparently making a motion to jump on it, when it fell on him, fracturing the right leg. The physician's bill, and expenses in caring for him in his sickness, were proved to be fifty dollars.

Kerr v. Forgue.

The instructions asked for and given, appear in the opinion. Judgment for plaintiff. Defendant appealed.

W. H. Richardson and *C. A. Lake*, for appellant.

Mason B. Loomis, for appellee.

THORNTON, J. Errors are assigned upon the modification of the following instructions, asked by appellant:

"1. The court instructs the jury that the proofs should support the allegations of the declaration, and if the allegation in the plaintiff's declaration is, that the plaintiff's son was injured while he was using due care, and if you believe, from the evidence, that he did not use due care (modified as follows here: that is, such care as a boy of his age and discretion would naturally do), then the proof does not support the allegations, and the law is, in such case, for the defendant.

"2. If the injury happened by and through the negligence of the boy and defendant, equally, then the law is for the defendant. (Modified as follows: But in determining the negligence of the boy, you must take into account his capacity, for he cannot be required to exercise as much care and caution as a person of mature years.)

"4. If the jury believe, from the evidence, that the negligence of the plaintiff's son David was gross (here modified as follows: judging him not by the standard of a man, mature, but as a boy), and that the negligence of the defendant was slight, then, in that case, the law is for the defendant.

"5. If the jury believe, from the evidence, that had plaintiff's son David used ordinary care (modified as follows: that is, such care as a boy of his age and discretion would naturally use), the injury complained of would not have happened, then, in that case, the law is for defendant."

These instructions, without the change made by the court, would require the same care on the part of a child, as one of maturer years.

A child can only exercise care and prudence equal to his capacity. Ordinary neglect as to a person of full age and capacity, might be

gross neglect as to a child. Hence, the age and discretion of the child were the proper subject of inquiry by the jury. The child is reckless and thoughtless; the man prudent and watchful. This child had the right to pass over this walk, and the party, in placing obstructions thereon, was bound to the utmost circumspection. *Chicago, Burlington & Quincy R. R. Co. v. Dewey*, 26 Ill. 255; *Robinson v. Cone*, 22 Vermont, 213; *Birge v. Gardiner*, 19 Conn. 507.

There was no error in the modification of the instructions. The negligence of appellant, in placing the obstructions on the sidewalk, and permitting them to remain there for several weeks, was much greater than the carelessness of the boy. There is not much resemblance between the case at bar, and the case of the *City of Chicago v. Starr*, Admr. 42 Ill. 174. In the latter case, the child was only six years old, and was not engaged in any necessary business or labor, but was roaming the streets, six blocks from home, in a crowded thoroughfare, without any sufficient excuse, and without any restraint on the part of his parents. The cases are clearly distinguishable.

It is also claimed that there was error in the refusal to give the following instruction:

"11. Defendant asked the court to instruct the jury as follows: You are instructed that all evidence tending to show permanent injury, is ruled out, so far as establishing any right to recover damages for permanent injury."

If the injury was serious and permanent, such fact would enhance the damages, which the father was entitled to recover for the loss of service during minority.

We have carefully examined all the instructions, and the evidence, and can find no error in the record. The evidence clearly tends to sustain the verdict. The question of negligence has been passed upon by a jury, under proper instructions, and we can perceive no reason to disturb the finding.

Judgment affirmed.

NOTE.—That the negligence of parent or guardian of an infant is a defense to an action by the infant against third persons for injuries was held in the following among other cases: *Hartfield v. Eoper*, 31 Wend. 615, which is the leading American case on the subject. *Honeysberger v. The Second Avenue R. R. Co.*, 33 How. 193; *Brown v. Maxwell*, 6 Hill, 502; *Kreig v. Wells*, 1 E. D. Smith, 74; *Spencer v. Utica R. R. Co.*, 5 Barb. 338; 37 id. 328; *Button v. Hudson*

Wead v. Larkin.

Bloor v. E. Co. 18 N. Y. 251; *Stevens v. Oswego, etc.*, R. R. Co. id. 425; *Munger v. Tonawanda R. R. Co.* 4 id. 349; *Wright v. Malden, etc.*, R. R. Co. 4 Allen, 283; *Callahan v. Bean*, 9 id. 401; see also *Lynch v. Nardin*, 1 Ad. & E. 29. The case of *Hartfield v. Roper* has been denied in the following cases: *Robinson v. Cons.* 23 Vt. 213; *Daley v. Norwich, etc.*, R. R. Co. 26 Conn. 508; *Philadelphia, etc.*, R. R. Co. v. *Spearen*, 47 Penn. St. 305; *Smith v. O'Connor*, 43 id. 218; *City of Chicago v. Mayor*, 18 Ill. 360; *Illinois Cent. R. R. Co. v. McClellan*, 42 id. 356; *City of St. Paul v. Kirby*, 8 Minn.; *Boland v. Missouri R. R. Co.* 36 Mo. 490; *Whitley v. Whittemore*, 1 Head. 620. In *Glassey v. Hustonville M. & F. R. R. Co.* 57 Penn. St. 173, the negligence of the parent was held to be a bar to an action by the parent for the loss of the child's service. In *Waite v. N. E. Ry Co. E. B. & E.* 719, the negligence of the grandmother with whom the child was travelling, was held to be a bar to an action by the child. In *North Penn. R. R. Co. v. Mahoney*, 57 Penn. St. 187, a child was injured through the negligence of its aunt, the defendants being also negligent, and the court held that the negligence of the aunt was not such contributory negligence as would discharge the defendants. In *Abbott v. Macfie and Hughes v. Macfie*, 33 L. J. Ex. 177, the defendant placed a shutter against the wall in a public street, the dress of a child who was playing in the street, and jumping off the shutter, caught thereon and it fell upon and injured him. Held, that the defendant was not liable to an action by the child. Held also that defendant's liability to another child injured by the shutter at the same time depended upon whether the children were playing together so as to be joint actors. In *Mangan v. Atterton*, L. R. 1 Ex. 239, the defendant exposed for sale, in a public place, unfenced and without superintendence, a machine which might be set in motion by any passer by, and which was, when in motion, dangerous. The plaintiff, a boy of four years old, by direction of his brother, seven years old, placed his fingers in the machine, while another boy was setting it in motion, and the fingers were crushed. It was held that the plaintiff could not recover. See also *Birge v. Gardiner*, 19 Conn. 507; *Holly v. Boston Gaslight Co.*, 8 Gray, 123; *Lanum v. Albany Gaslight Co.*, 46 Barb. 264.—RMP.

WEAD, appellant, v. LARKIN *et al.*

(54 Ill. 489.)

Conveyance—deed—covenant of warranty.

Where the covenantee, in a deed of land, takes possession and conveys, a covenant of warranty in the deed to him will pass to his grantee, although the covenantor was not in possession at the time of his conveyance.

ACTION of covenant by Larkin and others against Harding and Wead. It appears, in brief, that defendants conveyed certain lands to C. & A. Worden, and in the deed covenanted with them, their heirs and assigns, that they would forever warrant and defend the premises against patent titles. The land was then vacant. The Wordens took possession under the deed, and subsequently sold and conveyed to Larkin, and delivered to him possession. An action of ejectment was brought against him, pending which, he died, and his heirs, the present plaintiffs, having been made parties, judgment passed against them and they were evicted by a para-

mount patent title. The covenant of warranty in defendants' deed being thus broken, the present action was brought. Judgment for plaintiffs; appeal by defendants.

J. L. Bennett, for appellant, argued that the covenantor had neither title nor possession when he conveyed, and because the covenant runs with the land, therefore the grantee of the immediate covenantee cannot sue; and cited *Slater et al. v. Rawson*, 1 Metc. 456; *Nesbit v. Nesbit et al. Ex'rs*, 1 Taylor's (N. C.) Conf. R. p. 403-410; *Noke v. Auder*, Cro. Eliz. 373, 476; *Webb v. Russell*, 3 Term. R. 393; 4 Kent's Com. 471 (3d ed.), note 6; *Slater v. Rawson*, 6 Metc. 443-447; *Moore v. Merrill*, 17 N. H. 81; *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120; *Wilson v. Widenham*, 51 Me. 566; *Fowler v. Poling*, 2 Barb. 306; *Same v. Same*, 6 id. 166; *Greenby v. Wilcocks*, 2 Johns. 1; *Marston v. Hobbs*, 2 Mass. 433; *Spencer's Case*, 5 Co. 176; *Andrew v. Pearce*, 4 Bos. & Ful. 158; *Martin, Adm'r. v. Gordon*, 24 Ga. 535; *Beardsley v. Knight*, 4 Vt. 471; *Administrators of Backus v. McCoy*, 3 Ham. (Ohio) 221; *Randolph's Administrators v. Kinney*, 3 Randolph, 396; *Whittou v. Peacock*, 3 Bing. (N. C.) 411; *Paugeter v. Harris*, 7 C. B. 708; *Green v. James*, 6 Mels. & Welsby, 656; *Allen v. Woolley*, 1 Blackf. 249; *Bartholomew v. Candee*, 14 Pick. 167.

Goudy & Chandler, for appellees.

LAWRENCE, Ch. J. This case has been twice before this court, and will be found reported in 41 Ill. 415, and 49 Ill. 99. The facts are set forth in the opinion in 41 Ill., and it is unnecessary to repeat them here. After a third verdict and judgment against the defendants in the circuit court, they again bring the record here and submit it upon a question which has not hitherto been raised. It is now, for the first time, claimed that the action will not lie, because the defendants, at the time they executed the deed containing the covenant upon which they are now sued, were not in actual possession of the land, and had no estate in it of any kind. It is contended, in such cases, the covenants in a deed do not run with the land, because there is no estate to which they can attach, and, therefore, the grantee of the immediate covenantee cannot sue.

It is true, it has been held by the current of authorities, that the covenants of seizin, of a right to convey, and that the land is free

Wead v. Larkin.

from encumbrances, being *in presenti*, if broken at all, are broken as soon as made, and becoming at once mere choses in action, do not run with the land, or, in other words, do not pass to the grantee of the immediate covenantee. But, even on this point, there is some contradiction in the authorities, the King's Bench having held, in *Kingdon v. Nottle*, 1 Maule & S. 355, and 4 id. 53, that the assignee might sue on the ground that the want of seizin is a continuing breach. So, too, it was held in *Adm'r of Backus v. McCoy*, 3 Ohio, 211, that the covenant of seizin runs with the land, so long as the purchaser and the successive grantees under him remain in possession, and the rule is enforced by the court with very cogent reasoning.

But if it be true that these covenants *in presenti* cannot be made the basis of an action by the assignee, it is not denied that the covenant of warranty, which is the covenant in the case at bar, runs with the land and protects the grantee of the covenantee. This was settled in *Spencer's Case*, 5 Coke, and has probably never since been denied. It is claimed, however, in behalf of appellant in the present case, that, although this covenant runs with the land, yet, if the covenantor has neither actual possession nor legal title, there is no estate to which it can attach, and it does not pass to the grantee of the covenantee.

In support of this position, counsel cite the case of *Slater v. Rawson*, 1 Metc. 456, and, it must be admitted, this doctrine is there announced. The court say: "To support an action by an assignee, on the covenant of warranty, it is necessary the warrantor should have been seized of the land, for by a conveyance without such seizin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach." It is, however, admitted by the court, that if the covenantor is seized in fact, though without title, the covenant does attach and pass to the assignee, and when the same case came again before the court, at a subsequent term, as reported in 6 Metc. 442, the plaintiff was allowed to recover, on the ground that the covenantor had cut timber and hoop poles from the land, and thus had such a seizin as caused his covenants to attach to the land and pass to the grantee of the covenantee.

Notwithstanding our great respect for that court, this seems to us a very striking instance of the sacrifice of substance to shadow;

the true meaning and spirit of a rule, to the mere form of words in which it has been found convenient to express it.

A reason at least technically sound, whether in fact satisfactory or not, can be given why covenants *in presenti* do not pass to the assignee. The reason assigned for this rule by the courts which maintain it, is, as already stated, that these covenants, if broken at all, are broken as soon as made, and the covenantee thus acquires a mere chose in action, which, under the rules of the common law, cannot pass to an assignee by a conveyance of the land. But not so with the covenant of warranty. That operates only *in futuro*, and is only broken by eviction. It is admitted that it attaches to the land and passes to the assignee, if the covenantor has a seizin in fact, though a wrongful seizin. Why, then, should it not pass to the assignee of the covenantee, if the land is vacant at the time the covenant is made, and the covenantee, as in the present case, enters under his deed and then conveys? If the land were adversely held at the time of the first conveyance, and if the common law, rendering such a conveyance void, were still in force, it might be said the covenants were void as to the covenantee. But it is admitted in the case at bar, as it was in the Massachusetts case, that the covenant was a valid covenant to the covenantee, even though the covenantor was not in possession of the land. But, it was said, it did not pass to the assignee, because it attached to the estate, and the assignee took no estate. Yet, if a wrongful seizin on the part of the assignor would cause it to attach to the estate, and pass to remote grantees, and if, in the absence of seizin by the covenantor, the covenant was valid to the covenantee, as is admitted, we should like to inquire why, as soon as the covenantee took possession of the vacant land, the covenant did not then at once attach to the land, and pass with the conveyance of the covenantee? If the question of possession is at all important in reference to the passing of this covenant to an assignee, it is not the possession of the covenantor that is material, but that of the covenantee when he makes his conveyance. Then is the first time that the covenant passes as attached to the estate. When first made, it is made to the covenantee directly and in person, and he takes its benefit by virtue of his contract, and not as an incident to the estate. It can certainly never be held, that if he takes possession and is evicted by paramount title, he cannot recover, because the land was vacant when the deed was made to him. Even then, if we concede that

Wead v. Larkin.

he must take possession before he can pass the covenant to his grantee, as attached to the land, we are wholly unable to see why it does not pass if he has taken possession, or what the possession or non-possession of the covenantor, when the covenant was made, has to do with its passing to the grantee of the covenantee. The cases of *Moore v. Merrill*, 17 N. H. 81; *Beddoe's Ex'rs v. Wadsworth*, 21 Wend. 120, and *Fowler v. Poling*, 6 Barb. 166, cited by counsel for appellant, so far from being inconsistent with the position we have here taken, seem rather to support it. The last case was first heard at special term before a single judge, and is reported in 2 Barb. 306. It was held, as in the Massachusetts case, that as the covenantor had no possession, the covenant did not pass to the assignee. An appeal was taken to the general term, and it was there held, the conveyance by the covenantor in possession passed the covenant to the assignee.

The case of *Nesbit v. Nesbit*, 1 Taylor (N. C.) Rep., also cited by counsel for appellant, was one in which the grantors, by the face of their deed, did not purport to convey their own land, but that of their daughter, and covenanted that she should make good the title on her coming of age. The court held, the covenants were collateral to the title, and did not pass to the assignee. The decision is based on the peculiar character of the deed and covenants. The question was, whether the covenants in the peculiar deed before the court could pass to an assignee, and did not turn upon the question of possession.

Our conclusion is, that where the covenantor takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance. This is the case at bar.

It is not, however, to be supposed, because we do not now lay down a broader rule than is required by the case before us, that we hold, by implication, the covenants would not pass if the immediate covenantor should convey before taking possession. On the contrary, it would much better comport with the interests of this State, where vacant lands are so largely an article of commerce, to hold that the covenantor, whether sued by an immediate or remote grantee, is estopped by his deed from denying that he had an estate in the lands to which his covenants would attach, and which would pass by deed. The covenant, it is true, passes to the assignee as appendant to the land, but this does not mean the

actual title to the land, for, in such cases, no covenants would be needed. They are intended as a protection to the covenantee and his assignees, in case the covenantor has no title, and it is a very extraordinary mode of reasoning which leads to the conclusion, that, if the covenantor's want of title is also accompanied by a want of possession, for that reason he should be excused from liability to the remote grantee. We should be inclined rather to say, that although the covenant of warranty is attached to the land, and for that reason is said, in the books, to pass the assignee, yet this certainly does not mean that it is attached to the paramount title, nor does it mean that it is attached to an imperfect title, or to possession, and only passes with that, but it means, simply, that it passes by virtue of the privity of estate, created by the successive deeds, each grantor being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach.

In the case at bar, the defendants conveyed to the Wordens, and in their deeds covenanted with them, their heirs and assigns, that they would forever warrant and defend the premises against patent titles. The land was then vacant. The Wordens took possession under their deed, and subsequently sold and conveyed to Larkin, and delivered to him the possession. An action of ejectment was brought against him, pending which he died, and his heirs, the present plaintiffs, having been made parties, judgment passed against them, and they were evicted by a paramount patent title. The covenant of warranty in defendant's deed was never broken until then. It was never a mere chose in action in the hands of the immediate covenantees. No one but these plaintiffs has ever had, or can have, a right of action on this covenant. If they cannot have it, the covenant which was inserted in the deed of defendants, in order to give perpetual security to both immediate and remote grantees, has become a dead letter. And why? The only reason that can be given is, because the covenantors, instead of having a partial title or a tortious possession, had no title nor possession of any sort. Their security is to be found in the completeness with which their covenant has been broken. The reasoning does not commend itself to our judgment.

Judgment affirmed.

Chicago and Northwestern Railroad Company v. Simonson.

CHICAGO AND NORTHWESTERN RAILROAD COMPANY, appellant, v.
SIMONSON *et al.*

(54 Ill. 504.)

Railroad — fire communicated from locomotives — contributory negligence.

Land owners contiguous to railroads are as much bound, in law, to keep their lands from an accumulation of dry grass and weeds as railroad companies are; and when a fire is ignited on a railroad company's right of way, and is communicated in consequence of such accumulations to fields adjoining, the negligence of the owner will be held to have contributed to the loss, and unless it appears that the negligence of the company is greater than that of the land owner, the latter cannot recover.

ACTION on the case, brought to the Whiteside circuit court by Frederick Simonson, to recover of the defendant railway company, damages occasioned to the property of the plaintiff, by reason of the escape of fire from their locomotives, while running on their track across the land of the plaintiff.

There was a verdict and judgment for the plaintiffs, to reverse which the defendants appeal, assigning, among other things, as error, giving the instructions asked by the plaintiff.

The instructions complained of are the following:

"If the jury believe, from the evidence, that any one or more of the fires which are complained of by the plaintiff in the case, were caused by, or originated from, the carelessness of the defendants' servants, or the defect in the construction of the defendants' engine, or from the carelessness of the defendants in permitting dry grass and leaves, and other combustible matter to accumulate on the side of their said railroad track, adjoining the premises of the plaintiff, so that fire, first falling from defendants' engine, caught said dry grass or dry leaves, or other combustible matter, and thence communicated with the premises of the plaintiff, and thus occasioned the damage, or any part of it complained of, they will find the issues for the plaintiff, and assess his damages at such sum as they believe, from the evidence, he has sustained from such careless or negligent acts.

"If the jury believe, from the evidence, that any one or more of the fires that are complained of by the plaintiff, were caused by

Chicago and Northwestern Railroad Company v. Simonson.

or originated from, the carelessness of the defendants' servants, in the management of the locomotive of said defendants, or from their permitting dry grass and other combustible material to accumulate on the land of the defendants, on the sides of their said railroad track, adjoining the premises of the plaintiff, they will find the issues for the plaintiff, and assess his damages at such sum as they believe, from the evidence, he has so sustained."

H. W. Blodgett, James H. Howe and Henry & Johnson, for appellants.

Frederick Sackett and Dinsmoor & Stager, for appellee.

BREESE, J. (After stating facts.) The objection to these instructions, and each of them, is obvious. They leave out of the case the question of contributory negligence on the part of the plaintiff, in disregard of the rule established in *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 407, and *O. & M. R. R. Co. v. Shanefelt*, 47 id. 497, and *Ill. Cent. R. R. Co. v. Frazier*, id. 505.

It was declared by a majority of the court, in Shanefelt's case, that land owners contiguous to railroads were as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies were, so when a fire is ignited on a company's right of way, and is communicated to fields adjoining, the negligence of such owner will be held to have contributed to the loss, and unless it appears the negligence of the company was greater than that of such land owner, the latter cannot recover for injuries thus arising.

These instructions wholly ignore this doctrine, which must be regarded as the established doctrine of this court, and the defect is not supplied by any other instruction given in the cause.

In this case, however, it appears the fire from the engine was communicated to the wood lands of the plaintiff, as well as to his cultivated land.

On another trial, this fact will be considered by the court in its instructions, as abating that degree of diligence required of the land owner, for it is well known, it is almost impossible for such to keep his timber land clear of leaves, which are constantly falling, and soon become dry and inflammable.

As the instructions ignore, wholly, the doctrine of contributory

Bailey v. Godfrey.

negligence, the judgment, for that reason, must be reversed, and the case remanded.

Judgment reversed.

NOTE.—See *Barron v. Eldridge*, 1 Am. Rep. 128; *Pennsylvania R. R. Co. v. Kerr*, 1 id. 431; *Steinweg v. Erie R'y Co.*, 3 id. 673; *Bedell v. Long Island R. R. Co.*, 4 id. 698.

The doctrine of contributory negligence held in the principal case is directly opposed to the decisions in *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Vaughan v. Taff Vale R'y Co.*, 3 Hurl. & Nor. 743; *Same v. Same*, 5 id. 679. See to the same effect *Martin v. Western Union R. R. Co.*, 23 Wis. 437; *Piggott v. Eastern Counties R. R. Co.*, 54 E. C. L. 223; *Smith v. London & S. E. R. Co.*, L. R. 5, C. P. 98; *Vaughan v. Menlove*, 7 C. & P. 525 [32 E. C. L. 618]; *Hervey v. Nourse*, 54 Me. 256; *Turroville v. Slamps*, 1 Ld. Raym. 264; *Pantam v. Isham*, id. 19; *Field v. N. Y. C. & H. R. Co.*, 33 N. Y. 330; *Bachelder v. Hoagan*, 18 Me. 32; *Barnard v. Poor*, 21 Pick. 378; *Hart v. West. R. R. Co.*, 13 Met. 99; *Ingersoll v. Stockbridge, etc.*, R. R. Co., 8 Allen, 436; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Hooksett v. Concord R. R. Co.*, 38 N. H. 243; *Newson v. E. R. Co.*, 29 N. Y. 390. See, however, *Henry v. R. R. Co.*, 30 Vt. 638; *Norris v. R. R. Co.*, 28 id. 99; *Hertman v. R. R. Co.*, 18 B. Mon. 218; *M. & W. R. R. Co. v. McConnell*, 27 Ga. 461; *Carson v. R. R. Co.*, 8 Gray, 423; *Barry v. Lowell*, 8 Allen 129; *Fitchburgh R. R. Co. v. B. & M. R. R. Co.*, 8 Cush. 88.

The latest decision on the subject is that in *Kellogg v. The Chicago & Northwestern R'y Co.*, 26 Wis. 223, wherein after a most elaborate and powerful argument the doctrine of contributory negligence by the adjacent landowner was repudiated.—*EMF.*

BAILEY, appellant, v. GODFREY *et al.*

(54 Ill. 507.)

Chattel mortgage — vendee of mortgaged chattel — rights of mortgage — trover — evidence.

A chattel mortgage contained a condition that if, at any time, the mortgagee should feel himself "unsafe" or "insecure," he might take immediate possession of the property wherever it could be found. The mortgagor, without the knowledge or consent of the mortgagee, sold the property to an innocent vendee. In an action by the mortgagee against the vendee to recover the property, *held* (1), that trover would lie; (2), that the mortgagee need not prove, as a condition precedent to his recovery, that other property covered by the mortgage was insufficient to satisfy the debt, or that he had been unable to reduce such other property to possession; and (3), that the question, whether the mortgage was duly acknowledged and recorded, should not be submitted to the jury. LAWRENCE CH. J., McALLISTER and THORNTON, JJ., dissented.

ACTION of trover by Bailey against Godfrey and Charters. The facts appear in the opinion.

William Barge, for appellant.

B. H. Trusdell, for appellees.

Scott, J. The questions presented by this record may all be considered on the errors assigned, that question the rulings of the court in giving, modifying and refusing instructions at the trial.

The appellant seeks to recover of the appellees, for the price and value of a certain lot of wool, sold by one Charles Green to the appellees, for which they paid him the full market price, which, it is alleged, belonged to the appellant, and which the appellees converted to their own use.

The action was brought in replevin, but the property not being found, a count was added in trover.

The appellant claims title to the property under and by virtue of a chattel mortgage, executed by the said Charles Green to him, which mortgage contained a condition that if, at any time before the notes became due, to secure which the mortgage was given, the mortgagee should feel himself "unsafe or insecure," he might, in that event, take immediate possession of the property described in the mortgage, whenever it could be found, and proceed to sell the same to satisfy his debt.

Before the notes became due, Green, the mortgagor, removed the property, without the knowledge or consent of the appellant, from Ogle county, where the mortgage was executed and recorded, to Lee county, and there sold the same to appellees. There is no evidence that tends to show that the appellees had any knowledge of the existence of a mortgage, or the lien created by it, at the time they purchased the wool from the mortgagor.

On the trial, the court held the law to be, and so instructed the jury, that "a stipulation in a chattel mortgage, that the mortgagor shall retain the use and custody of the mortgaged property until he makes default in the payment of the mortgage debt, will debar the mortgagee from recovering in trover the value of said property, which may be purchased of the mortgagor prior to such default."

If it is intended by this instruction to assert the principle that, before a party can recover in trover, he must either have the actual possession of the property, or the immediate right of possession thereof, then it certainly states a correct principle of law. 1 Chitty's Pl. 148, and authorities there cited.

We are unable to perceive that the rule attempted to be asserted in the instruction, has any application to the case before us; certainly not in the form as there stated. An instruction may often contain a correct abstract principle of law, yet may be so

Bailey v. Godfrey.

worded as to tend to mislead a jury. The true test to apply to this instruction, if we admit it states a correct principle of law, is, did it tend, in this instance, to mislead the jury on the facts submitted to them in this particular case? It is undoubtedly true, that a party, before he can maintain trover, must have had the actual possession of the goods claimed to be converted, or the right to the immediate possession thereof.

The exact question involved in this case may be logically stated thus: The clause in the mortgage which provided that, in case the mortgagee should feel "unsafe or insecure" in regard to his debt, gave the mortgagee the right to elect when he should take possession of the goods. By the express terms of the mortgage, the mortgagee was invested with the power to elect, and was made the sole judge of the happening of the contingency when he would elect, to take possession of the property. In his judgment, that contingency did happen when the mortgagor sold the property, and upon his election, his right to the possession of the property became immediate.

In the case of *Frisbee v. Langworthy*, 11 Wis. 375, where, by the express terms of the mortgage, the plaintiff was authorized to take possession of the property and sell it at any time he saw fit, or what is the same thing, at any time he deemed his debt insecure, it was held that replevin could be maintained in case the goods were levied on by an execution.

In *Welch v. Sackett et al.* 12 Wis. 243, the court affirmed the rule laid down in *Frisbee v. Langworthy*, and say, "we there held that a mortgagee of personal property, not in actual possession, might maintain replevin against a person taking the same in defiance of his rights, where, by the terms of the mortgage, he was entitled to take possession whenever he deemed that his interest or the safety and security of the debt required."

In the case of *Spriggs v. Camp et al.* 2 Speers, 181, it was held that trover could be maintained at the suit of the mortgagee, where the property was levied on in the hands of the mortgagor, after condition broken.

The reason for the rule in all these cases is, that the property is conditionally conveyed to the mortgagee, and is only in the permissive possession of the mortgagor, which the mortgagee may terminate for condition broken, or by the express terms of the mortgage itself.

The right to take immediate possession of the property before the mortgage debt becomes due, and even before default in payment has been fully recognized by this court, in a case where the mortgage contained a clause very similar to the one contained in the mortgage in the case before us. *Fox v. Kitton*, 19 Ill. 519.

In that case the court say, "if default was made on the new security, it is not doubted that the plaintiff could take possession and sell; equally so if, at any time after the extension and new security given, he should judge he was in danger, notwithstanding all his caution, of losing the debt thus attempted to be secured; it is 'so nominated in the bond.'"

The fact that the property was sold by the mortgagor in this case, afforded the mortgagee ample reason to feel "unsafe and insecure" in regard to his debt. The property had been sold without his knowledge or consent. There is no evidence that indicates that the mortgagee had any knowledge of the intention of the mortgagor to sell the property, so that he could have made his election, and secured the identical property described in the mortgage. The sale was actually made before the mortgagee had any information on the subject.

The mortgage was duly executed and recorded, and the contract between the parties is one that is recognized by the law as valid; it must be held, that whoever buys the property described in the mortgage, takes the same with constructive notice of the lien thereby created. By the express terms of the mortgage, the mortgagee, therefore, had the right to follow and reclaim the property wherever it could be found, and also the right to use, for that purpose, any appropriate common law action.

The court, in another instruction, told the jury in substance that the plaintiff could not recover if there was other property embraced in the mortgage, "without first showing that said other property was insufficient to satisfy said mortgage indebtedness, or that he had been unable to reduce said other property to his possession."

This instruction does not state a correct legal principle. It is true, however, that a party only having a special interest in property, can only recover in an action for conversion, to the extent of that interest, and that he cannot recover beyond his special interest in the property.

In the case of a mortgagee, he cannot recover in an action for the conversion of the property, beyond the amount of his mortgage

Bailey v. Godfrey.

indebtedness. But the mortgagee has the undoubted right to have his debt satisfied out of any property embraced in the mortgage, to the extent of the amount due him. The defendants in this case, with great propriety, might have pleaded in reduction of the plaintiff's special interest in the property, that other property was embraced in the mortgage, and that the plaintiff had reduced the same to possession in reduction of his mortgage indebtedness.

Ward v. Henry, 15 Wis. 239.

The burden of proof on these facts, if they existed at all, was on the appellees and not on the appellant. It was a matter of defense, and the party that would avail of such a defense, must make the proof.

The court modify the first instruction asked by the appellant, by adding the words, "provided, such mortgage is proved to have been duly acknowledged and recorded." This was error. It was in effect to submit to the jury, the question of the due acknowledgment of the mortgage. That was purely a question of law. In *Bullock v. Narrott*, 49 Ill. 62, it was held to be improper to submit such a question to the jury. The court there say, that it was a question of law for the court to determine on the mortgage being offered in evidence, whether it was duly acknowledged according to law.

For the error of the court in giving to the jury the improper instructions indicated at the instance of the appellee, and in modifying on motion, the first instruction asked by the appellant, this judgment must be reversed and the cause remanded for a new trial.

Judgment reversed.

LAWRENCE, Ch. J., and McALLISTER and THORNTON, JJ., dissent.

NOTE.—See *Hathaway v. Brayman*, 1 Am. Rep. 334 wherein the court of appeals of New York, held that a mortgagor of chattels in possession has right before default to sell and deliver the mortgaged property subject to the mortgage, and if the purchaser dispose of it again before default in payment, and before demand of possession, he will not be liable for conversion. The court intimated that it was the duty of the mortgagee to follow the property into the hands of the one having possession and that a demand was necessary.

LAMAR INSURANCE COMPANY, appellant, v. MCGLASHEN *et al*

(54 Ill. 512.)

Marine insurance — measure of damages — calculation of loss.

In an action on a policy of marine insurance issued upon a cargo of corn, it appeared that only a portion of the corn was damaged. *Held* (1) that, by the terms of the policy, loss, if any, being "payable to the Bank of Montreal in funds current in the city of New York," the premium on gold should not be allowed in estimating the amount to be paid by the insurers; (2), that the measure of damages, in such cases, is not the difference between the market value of sound and damaged corn, but such a proportion of the valuation fixed in the policy as the difference between the market value of sound and damaged corn bears to the market value of sound corn; (3), that charges for surveys, inspection and sale at auction, being reasonable, are part of the loss; and (4), that amounts paid for insurance while retaining the cargo in store, and charges for storage, being unreasonable, are not part of the loss.

ACTION upon a policy of marine insurance. The facts appear in the opinion.

Scammon, McCagg & Fuller and Lawrence Proudfoot, for appellants, cited 2 Parsons on Marine Ins. 399-402; 3 Kent's Com. 430-432; 2 Arnold on Ins., § 3, p. 968; Stevens & Benneck on Averages, 292-294; *Lewis v. Rucker*, 2 Burrows, 1167; *Usher v. Noble*, 12 East, 639; *Johnson v. Sheddon*, 2 id. 581.

Rae & Mitchell and Hervey, Anthony & Galt, for appellees.

MCALLISTER, J. This was an action of assumpsit, brought by appellees against appellants, upon a contract of marine insurance, bearing date the first of May, A. D. 1866, whereby appellants insured, under policy No. 155, for account of appellees, \$15,000, on 20,981.18 bushels of corn, valued at the sum insured, on board of the bark Mary Merritt, from Chicago to Montreal. Loss, if any, payable to the Bank of Montreal, in funds current in the city of New York, with permission to tranship at Kingston, on standard barges or vessels. Premium of insurance, \$285.60, acknowledged to have been received by the agents of appellants. The policy referred to provides that the beginning of the adventure shall be from and after the lading thereof, and continue until landed at the port of destination; but not to exceed forty-eight

Lamar Insurance Company v. McGlashen.

hours after the arrival and anchorage or mooring of said vessel at the port of destination aforesaid.

The bark left the port of Chicago on the 30th of Apr'l, 1866; but, in consequence of a severe storm, she was obliged to return about the third of May. After a survey, and with the consent of appellants' agent, she proceeded again. In the course of the voyage the water got in, and when she arrived at Kingston, about the twentieth, it was found that 400 bushels had become so wet and damaged as to require an immediate sale. The residue was receipted in apparent good order, transhipped upon a barge and taken to Montreal, arriving there on the twenty-eighth or twenty-ninth of May. On the thirtieth it was inspected by an authorized inspector, and declared rejected. It is an undisputed fact, that it was then in a heated or heating condition. It was under the care of the consignees, but permitted to lie in the vessel some three or four days, and then put into store for the purpose of being handled and dried. Consignees obtained an insurance upon it, while in store, paying eighteen dollars as a premium. A few days before the 4th of July, 1866, 1,000 bushels of it were sold at private sale, at fifty-six cents, and on the fourth the residue was sold at auction, different lots bringing different prices.

These being the main facts, it is now necessary to determine whether the proper measure of appellants' liability was regarded upon the trial. Appellees' statement of account between them and appellants, sufficiently shows what that measure was. It was arrived at in this manner: The market price of sound corn, at Montreal, at the date of arrival of cargo, was estimated at fifty-six cents per bushel. Appellees find what the whole cargo would have amounted to at that price. They then deduct from that amount the net proceeds of all the corn sold at the times and in the manner above stated; but, in arriving at the net proceeds of the latter, they deduct \$1,106.96 as the charges for handling it, and among the items making up that amount is the eighteen dollars paid for insurance on it while in store (although the risk of appellants did not extend beyond forty-eight hours after its arrival at Montreal), and \$823.77 for storage and drying; and, after all these deductions, the balance claimed to be due appellees, according to their own statement, was \$3,742.96. The jury, having no other data, found a verdict for \$6,022.29, and the court below refused to set it aside and grant a new trial. We have been unable, after the most careful

Lamar Insurance Company v. McGlashen.

examination of the testimony, to resort to any proper calculation by which the amount of this verdict can be sustained, and no theory has been suggested by which it can be sustained. Appellees prefixed to the amount of balance due, according to their statement given in evidence, the word "gold," and it has been suggested that the jury must have allowed the premium on gold in 1866. If so, it was wrong; because, by the terms of the policy, the amount insured is payable in funds current in the city of New York.

It is apparent that an incorrect measure of appellants' liability was adopted at the trial. The basis of the verdict was the difference between the market price of the sound, and the market price of the damaged corn, including all the particular charges above mentioned. That difference may give the amount of appellees' loss; but it is not the amount appellants are liable to pay, because, first, it would make the market price of the corn the basis of the appellants' liability, when the true basis is the valuation in the policy; and it would involve the insurer in the rise and fall of the markets, with which he has no concern. The extent of loss the appellees sustained on this corn by sea damage is one thing, and the amount the insurance company is bound to pay is quite another; accordingly when the corn arrived at the port of destination sea damaged, two points were to be ascertained: First, the extent of depreciation in value which it had suffered; second, the amount which the insurer ought to pay in respect thereof. The first point could be ascertained by simply comparing the price for which the corn would have sold in the market, had it arrived there sound, with the price for which it might have sold, arriving there damaged. But the object of comparing the proceeds of the sound and damaged sales for the purpose of indemnity under the policy, is not to ascertain the *direct amount* of the appellees' loss, but its *relative amount*—the proportion which it bears to the price at which the corn would have sold if sound; the question being, not whether the depreciation amounts to any *fixed* sum, but whether it amounts to one-half, one-third or two-thirds, or any other proportion of the sum for which the corn would have sold if sound; whether, in short, the property was one-half, one-third or two-thirds the worse for the sea damage. When this is ascertained, the liability of the insurance company is ascertained also, for they pay the same proportional part.

Lamar Insurance Company v. McGlashen.

The corn in question was valued in the policy. It was not claimed that there was more than a partial loss. The mode of measuring the liability of the insurer in such case, is laid down in the leading case of *Lewis v. Rucker*, 2 Burr. 1167, by Lord MANSFIELD: "Where," said he, "an entire individual, as one hogshhead, happens to be *spoiled*, no measure can be taken from the prime cost, to ascertain the quantum of damage; but if you can fix whether it be a third, a fourth or a fifth worse, the damage is fixed to a mathematical certainty." And this, he says, "is to be done by the price at the port of delivery."

In *Usher v. Noble*, 12 East, 647, Lord ELLENBOROUGH stated the rule thus: "The difference between the sound and damaged sales affords the proportion of loss in any given case, *i. e.*, it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against; when this is ascertained, it only remains to apply this liquidated proportion of the loss to the standard by which the value, as between the assured and the underwriter, is calculated (*i. e.*, the prime cost or value in the policy), and you have the one-half, the one-fourth, or the one-tenth of the loss, in terms of money."

The rule by which to calculate a partial loss, in such a case as this at bar, is the difference between the respective *gross* proceeds of the same article when sound and when damaged, and not the *net* proceeds. *Johnson v. Sheddon*, 2 East R. 581, which case decides that the underwriter is not to bear any loss from fluctuation of markets, or port duties, or charges after the arrival of the goods at their port of destination. It is said in 2 Arnould on Ins. 969, that, "by the *gross* produce of the sale, is meant the market price at which the merchant, after paying freight, duty and landing charges, can sell the goods to the consumer or purchaser at the port of arrival," and that, "by the term *net* proceeds, is meant the gross proceeds, *deducting freight, duty and landing charges.*" *Id.* 970.

It is claimed by appellants' counsel, that the charges for handling this cargo, after its arrival, were such as could not be included in the amount of indemnity which the appellants are liable to pay. There are charges of a certain class which are to be borne by the underwriter, though not a part nor a direct consequence of the sea damage. Sales by auction are resorted to mainly, with the view of comparing the sound and damaged values, so as to ascertain the

Lamar Insurance Company v. McGlashen.

amount of indemnity which the insurer has to pay. There may be other modes. The question, in all such cases, is, was that expense reasonable and proper, for the purpose of ascertaining the amount of the loss? If it be, then it is a part of the loss. In *Muir v. United Ins. Co.*, 1 Caine's R. 49, the court said: "Had the sale at auction been to ascertain the injury the cargo had received, and limited to such parts as were damaged, it would have been a reasonable charge, but that appears not to have been the object or effect of the auction," and it was there held that the charges attending the auction could not, for that reason, be considered as a loss to be borne by the underwriters. 2 Parsons on Mar. Ins. 399; 2 Arnould, 973. The principle being, that the charges, in order to be considered a part of the loss, must be reasonable and proper for the purpose of ascertaining the amount of the loss; the inquiry as to a particular charge being of that character, might involve questions of fact, but when the facts are undisputed, it is the duty of the court to determine whether such extra charges were necessary to ascertain the partial loss, and, therefore, formed a part of it.

That the amount paid for insurance, while retaining this corn in store, was not reasonable or proper, is quite clear, and, under the rules laid down as to the mode of ascertaining the quantum of damage, there can be no reason shown to support the charge for storage. The quantum of injury should be ascertained immediately, or within a reasonable time. The storage was not for that purpose, but for the purpose of securing a rising market. The condition of the grain, for all the practical purposes of a public sale, could have been ascertained by inspection or survey.

If it was stored for the purpose of a more advantageous market, or any purpose other than that of a reasonable and proper mode of ascertaining the extent of the injury, the appellants would not be liable to that expense as a part of the loss. For the legitimate object of determining the extent of injury, it was immaterial whether the market, at the time of arrival, was rising or falling. Lord MANSFIELD, in *Lewis v. Rucker*, *supra*, said: "Whether the price there (the port of delivery), be high or low, in either case it *equally* shows whether the damaged goods are a third, a fourth or a fifth worse than if they had come sound."

The items for surveys, inspection and sale at auction, may, under the circumstances above indicated, be properly chargeable as a part of the loss

Lamar Insurance Company v. McGlashen.

The court below having, by instructions to the jury, sanctioned a measure of liability on the part of appellants, different from that above enunciated, the judgment must be reversed and the cause remanded.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

JAUHA, appellant, v. MONTGOMERY.

(33 Ind. 36.)

Promissory note — non-negotiable instrument — estoppel — parol agreement.

The maker of a non-negotiable promissory note signed and delivered to the payee, to enable him to negotiate it, a separate writing, as follows: "This is to show that the note * * * is all right and will be paid when it comes due." The note was assigned, and, after it became due, the assignee, upon the promise of the maker that he would pay it at a specified time, forbore to sue. In an action on the note by the assignee against the maker, *held* (1), that, notwithstanding the writing, the defense of want of consideration and fraud would be valid (ELLIOTT, J., dissenting); but (2), that the promise constituted a new and enforceable contract. (GREGORY, Ch. J., dissenting.)

ACTION on contract. The facts appear in the opinion.

J. B. and A. Jaqua and J. W. Headington, for appellant.

J. N. and A. M. Templar, for appellee.

FRAZER, J. The court below sustained a demurrer to the second paragraph of the reply, and this ruling we are called upon to review.

One paragraph of the complaint averred, that the defendant, on the 25th of February, 1865, made his promissory note to one Antisdale, payable in one year, which Antisdale assigned to the

Jaqua v. Montgomery.

plaintiff before maturity; that after it became due, the defendant promised the plaintiff to pay the note on the 1st of September, 1866, in consideration that the latter would give day of payment and forbear to sue until that time; that the plaintiff, in consideration of said promise, so agreed and performed his agreement; that the time for payment has passed, and the defendant has failed to pay, etc. The other paragraph was in the common form upon the note. The answer was in three paragraphs. The first and second of these impeached the note for want of consideration and fraud in obtaining it; for reply to which, the plaintiff, by the paragraph to which the demurrer was sustained, averred, that the plaintiff was induced to purchase the note by reason of a writing of even date therewith made by the defendant and delivered to the payee, to enable the latter to negotiate the note, as follows:

"BEARCREEK, TP., IND., Feb. 28, 1865.

"This is to show that the note given by me, this day, to John S. Antisdale for \$75 is all right and will be paid when it comes due.

"(Signed) J. C. MONTGOMERY."

The appellant argues that the defenses pleaded were insufficient, inasmuch as he took the note before its maturity without notice, and cites cases applicable to commercial paper. They are not applicable to this case, the note sued on not being of that class of obligations.

It is further insisted that the fact alleged in the reply constituted an estoppel. It is familiar doctrine, that where the maker of a note represents to one who he knows is about negotiating for the paper, that he has no defense to it, and upon the faith of such assurance the paper is purchased, he will be estopped from making defense. But that is not quite the case before us. The making of a promissory note imports in law a sufficient consideration, and it is a fair inference from its mere existence that the maker believes that he is liable to pay it, and that he honestly intends to pay it when he executes it. When such a note is delivered to the payee, the maker puts it in his power to exhibit all this evidence of a valid obligation and real purpose to pay, to the whole world. He is thus enabled often to impose upon an unwary purchaser. And yet, in such a case, the consideration of the note may be questioned in the hands of an innocent holder. And if to the ordinary terms of the note were superadded an express declaration of what would other

wise be plainly implied, it would hardly increase the currency of the note in the market; and we suppose it would never be held to work an estoppel. We think that no case can be found which carries the doctrine of estoppel to so great an extent. The fact that the assurance is written on a separate paper, though at the same time, should make no difference. The two instruments are as truly a single transaction as if the contents of both had been embodied in one. We have a plain statute allowing the same defenses to a note in the hands of an assignee that could be made as against the payee, and we do not think it should be rendered nugatory by doubtful estoppels. And yet it must be admitted that the difference is not very marked between this case and one where the maker should, an hour after giving the note, innocently assure a person about to purchase it, that he had no defense to it, not supposing that any existed. In the latter case, direct authority would probably compel us to apply the doctrine of estoppel, notwithstanding the statement was made in ignorance of the facts, and under the influence of a recent deception which there had been no opportunity to discover. But in the case before us, we are not constrained by direct authority, and there is at least these slight differences between this and the case supposed. Here the assurance was given at the same instant with the execution of the note, while there it was afterward; here it was general and to nobody in particular, there it was special and personal to one about to act and who could not be influenced by it. We have doubted upon the question before us, and considered it much, but a majority now concur in the opinion that there was no estoppel, our brother ELLIOTT dissenting.

But the reply was nevertheless good enough for a bad answer, and hence there was error in sustaining a demurrer to it if the answer was bad.

One paragraph of the complaint, as we have seen, counted upon a promise, made after the maturity of the note, to pay at a subsequent day in consideration of forbearance, and alleged such forbearance. If this new promise was valid and supported by a sufficient consideration, it constituted a new contract, binding in law and capable of enforcement. It was not a contract forbidden by law or public policy. Had it, then, a sufficient consideration to support it? Either a benefit to the promisor, or an inconvenience to the promisee, constitutes a valuable consideration. Upon the

Jaqua v. Montgomery.

maturity of the note, if there was a valid defense to it, the plaintiff, an assignee, had the undoubted right to go at once upon the assignor. This was a valuable right, and its surrender or waiver would be a sufficient consideration for the new promise of the defendant. There would be plain injustice in allowing the defendant to attack the validity of the note at the end of the period of additional credit given in consequence of his new promise, and after he had, upon the faith of that promise, led the plaintiff to forego his remedy against the assignor. If he might thus disregard the new promise, he would, without incurring liability, have inflicted upon the plaintiff the injury of delay, to which might also be added ultimate loss, if loss should occur by such delay in pursuing his remedy against the assignor. The majority of the court, GREGORY, C. J., dissenting, concur in the opinion that the first and second paragraphs of the answer were not good defenses to the second paragraph of the complaint, and that the demurrer to the second paragraph of the reply should have been sustained to those paragraphs of the answer.

Judgment reversed, with costs, and cause remanded, with directions to proceed according to this opinion.

ELLIOTT, J. The first and second paragraphs of the answer are pleaded to the whole complaint, and I fully concur in the opinion by FRAZER, J., that neither of said paragraphs amounts to a good defense to the second paragraph of the complaint. The note was a valid cause of action in the hands of the plaintiff as assignee; it was regular on its face, and imported, *prima facie*, a sufficient consideration to support it. It was not void, though liable to be impeached for fraud or for the want or failure of consideration; and if, upon its maturity, the defendant had refused to pay it, because of the matters of defense set up in the first and second paragraphs of the answer, the defense, if true, would have been available, under the statute, against the assignee.

But it is alleged in the second paragraph of the complaint, that after the maturity of the note, the defendant, in consideration that the plaintiff would forbear to sue upon it until the 1st day of September, 1866, promised to pay it to the plaintiff at that time. If the defendant had refused to pay the note at its maturity, and had notified the plaintiff of his defense, the latter would have been at liberty to prosecute an action, immediately, against the defend-

Jaqua v. Montgomery.

ant, and controvert the alleged defense, or he might have proceeded at once against the assignor, and taken upon himself the burden of showing that a suit against the defendant would have been unavailing. By the defendant's promise to pay the note on the 1st of September, 1866, and the agreement of forbearance in consideration of that promise, the plaintiff was delayed in bringing suit, either against the defendant or the assignor, until the expiration of that time. This delay was, of itself, a detriment to the plaintiff; but, in addition thereto, he was subject to the risk that the assignor as well as the maker might, in the mean time, become insolvent; and this detriment, inconvenience and risk, constituted a sufficient consideration to support the defendant's promise to pay the note at the time agreed upon.

In argument, much stress is laid on the statute, which, in reference to notes of this class, declares that whatever defense or set-off the maker had, before notice of the assignment, against an assignor, or against the original payee, he shall also have against their assignees; but it must be remembered that here the second paragraph of the complaint is based on a promise made by the maker to the assignee, which is supported by a sufficient consideration, and to this promise the matters set up in the first and second paragraphs of the answer present no defense.

But I cannot concur with my brother judges in the conclusion reached by them, that the matters alleged in the second paragraph of the reply do not constitute a valid estoppel. It is alleged in that paragraph, that the defendant at the time of the execution of the note, and for the purpose of assisting the payee in the negotiation or sale thereof, and to induce its purchase, executed and delivered to the payee the following statement in writing:

“ BEARCREEK TP., Ind., Feb. 28, 1865.

“ This is to show that the note given by me this day to James S. Antisdale for \$75 is all right and will be paid when it comes due.

“(Signed) J. C. MONTGOMERY.”

It is further averred that said statement accompanied said note at the time the plaintiff purchased it of the payee, and that, relying on said statement, the plaintiff was induced to make the purchase in the belief that the note was given for a valuable consideration, that the defendant had no defense thereto, and would pay it at maturity. It is conceded to be a familiar doctrine, that where the

maker of a note represents to any who he knows is about negotiating for it, that he has no defense to it, and upon the faith of such assurance the paper is purchased, he will be estopped from making defense. It is, to my mind, extremely difficult to draw any well founded distinction, in principle, between such a case and the one under consideration.

The prevention of fraud is the peculiar characteristic of the doctrine of estoppels *in pais*. And hence, when one party by words or acts knowingly induces another, who relies thereon, to act in a material matter of interest, the person including such action is estopped from denying the truth of his words or acts, even by the assertion of the truth, when to do so would work a fraud or injury to the other.

Here, it is averred that the writing set forth in the reply was given to the payee of the note to enable him to negotiate it, by inducing some one to become the purchaser. True, it was not addressed to the plaintiff by name, but that fact, it seems to me, does not affect the case.

It was not addressed by name to any other person, by which its application might be limited. It was general in its terms, and should be considered, as it was evidently intended, as being addressed to any who was willing to purchase the note. It is like a general letter of credit addressed to any who might deal with the person to whom the credit is given. It was given to induce some one to buy the note, and upon the faith of it the plaintiff became the purchaser. It accomplished the purpose for which it was given, and it would be a fraud upon the plaintiff to permit the defendant now to deny its truth.

It is claimed, however, that as the statement was executed at the same time as the note, which, *prima facie*, imported a valuable consideration, they must be taken together as one instrument, and, in that view, that the written statement amounts to nothing more than the note alone imports. This position does not seem to rest on any solid foundation. No importance can be attached to the fact that the instrument set up in the reply and the note were given at the same time. Suppose the plaintiff had been present at the execution of the note, and had then informed the defendant that he was about to purchase it, and had asked if there was any defense to it, and the defendant in reply thereto had made the statement contained in the writing, and the plaintiff, relying thereon, had then

purchased the note, would it be contended that the defendant would not have been estopped from impeaching its validity? The statement was sent forth with the note to be shown to any one who might be willing to become the purchaser, and whether it was negotiated on the day of its date or at a subsequent time, the defendant, by the writing, said to the purchaser, the note is all right, and will be paid at maturity.

Nor can it be maintained that the writing contained nothing more than the note imports. The note contains a promise to pay the sum named at the time stipulated, and, *prima facie*, it imports in law, that it was given upon a sufficient consideration to support the promise. In other words, under the law, the plaintiff was not required to allege in the complaint, and prove on the trial, the consideration for which the note was given, because, in the absence of a showing to the contrary, the law infers a consideration; but still the defendant would be at liberty to show that it was given without consideration, or set up any other valid defense he might have to it, as to which nothing is implied by the note. But the writing goes much further; in legal effect, it not only admits a valuable consideration, but asserts that the defendant had no defense, whatever, to the note.

It seems to me clear that the reply shows a valid estoppel against the defense set up in the first and second paragraphs of the answer.

GREGORY. C. J. As stated in the opinion of the majority, I do not concur in the proposition that the agreement of forbearance, charged in the second paragraph of the complaint, renders the answer impeaching the consideration of the note bad on demurrer.

If the note was *nudum pactum*, then the agreement of forbearance was without any consideration to support it. This proposition as between the maker and payee will hardly be disputed. A new promise, made in consideration of a previous obligation entered into without any consideration, is not binding on the promisor, even where the obligation is surrendered at the time. *Copp v. Sawyer*, 6 N. H. 386; *Hill v. Buckminster*, 5 Pick. 391.

But it is claimed that this rule is not applicable as between the assignee and maker of the promissory note in suit. This note is governed by the statute, which provides that "whatever defense or set-off the maker of any such instrument had, before notice of assignment, against an assignor, or against the original payee, he

shall have also against their assignees." 1 G. & H. 448, sec. 3. In relation to this kind of paper, the assignee stands in the place of the payee as to every defense existing at the time of notice of the assignment. It is said that this promise to pay the note at the expiration of the time stipulated is binding on the maker for the reason that the assignee surrendered his right of action against his assignor and thereby suffered detriment. Can this proposition be maintained? I think clearly it cannot. The indorser of a note, under our statute, warrants two things: first, that the note is valid and the maker liable to pay it; secondly, that the maker of the note is solvent and able to pay it. *Howell v. Wilson*, 2 Blackf. 418.

The indorsee of a note, obtained from the maker without consideration, has a right, as soon as he discovers the imposition, to sue the indorser for having assigned him a note which the maker is not able to pay. *Id.* The warranty as to the validity of the note is broken at the time it is made. The note is not valid.

Now all that can be claimed for the appellant is, that he relied upon the promise of the appellee and did not (as he might have done) sue the indorser. But the appellant was not legally bound to wait, and his doing so was voluntary on his part, without the consent of the appellee. Indeed, for aught that appears in the pleadings, the appellant may have successfully pursued his remedy against his indorser. There is no averment in the complaint on the subject, and certainly there can be no legal presumption that the appellant refrained from doing that which he had legal right to do. The assignee was in privity with the assignor; the maker, as to them, was antagonistic. It could not, in any legal sense, be said, that the maker was negotiating for and on behalf of the payee of the note; the former had no interest in the question of liability as between the assignee and assignor. The rule as to valuable considerations is very carefully and accurately stated by Mr. Chitty and by Judge BOUVIER in his Law Dictionary. The latter states the rule thus: "Valuable considerations are those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance or request; or from which some detriment is sustained, at the instance of the party promising, by the party in whose favor the promise is made." See title CONSIDERATION, 1 Bou. L. D. 329.

Mr. Chitty states the rule thus: "The general rule as to the sufficiency of the consideration seems to be, that it may arise either,

Jaqua v. Montgomery.

first, by reason of a benefit resulting to the party promising, or to a third person, by the act of the promisee; or, secondly, by reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, however small the benefit, charge or inconvenience may be; provided such act be performed, or inconvenience or charge incurred, with the consent, express or implied, of the promiser, or, in the language of pleading, at his request." Chit. Con. 28.

This court, in *Mathews v. Ritenour*, 31 Ind. 31, recognizes the rule as stated by Judge BOUVIER.

It is true, that, in *Pierce v. Goldsberry*, 31 Ind. 52, this court held, ELLIOTT, J., dissenting, that an oral agreement of the principal debtor to pay merely the same interest that the note would have borne if the indulgence had been given voluntarily, is a sufficient consideration for a promise of forbearance for a definite time; but that was a valid note, based upon a valid consideration.

In the case now before us, there was no new consideration; the pleadings show that there was an oral agreement for forbearance for a time fixed.

It is clear to my mind, that if the appellant suffered any detriment in not pursuing his legal remedy against his indorser, it was his own act, and not suffered at the instance of the appellee, and that therefore the promise of the latter to pay the note at the expiration of the time fixed was a *nudum pactum*.

I think the majority are very clearly right on the question of estoppel.

The instrument signed at the time the note was executed has not the first element of an estoppel. It is no more than what the note itself imported on its face. It was obtained by the same fraudulent act that procured the execution of the note. It was a part of the same contract, and was as much a part of the note as if it had been incorporated in it. It was a statement upon which the appellant had no right to rely. Indeed, I think that such a paper accompanying an ordinary promissory note should have the effect of exciting suspicion that all was not right. It looks too much like the act of the thief in attempting to cover up his crime.

I think the judgment ought to be affirmed.

Judgment reversed.

DUNN *et al.*, appellants, v. JOHNSON.

(88 Ind. 54.)

Breach of contract—measure of damages.

In an action to recover for a breach of a contract to deliver logs to be sawed at plaintiff's mill—*held* (1), that the fact that the plaintiff sold his mill after he was notified by the defendants that they would pay for no more sawing, and deliver no more logs, or that he made a sub-contract with some other person to saw the logs that might be delivered, could not affect the right of recovery, or the measure of damages; (2) that the measure of damages was the contract price of sawing, less the cost of doing the work, in labor, in wear and tear of machinery, in time of use of machinery, and value of superintendence.

ACTION on contract. The facts appear in the opinion.

N. B. Taylor, M. M. Ray, J. W. Gordon, W. Marsh and S. Major for appellants.

J. T. Dye and A. C. Harris for appellee.

RAY, J. This was a suit upon a written contract brought by the appellee against the appellants, for sawing lumber for them and for a failure to deliver logs to be sawed into lumber, as they had contracted by a written agreement whereby they agreed to furnish at the plaintiff's mill one thousand saw-logs to be sawed by the plaintiff at seventy-five cents per hundred feet, payment for the sawing to be made every two weeks, the plaintiff to pile the defendant's lumber separate from other lumber. This contract bore date on the 3d of January, 1865. The breaches alleged were a failure to pay for lumber sawed as agreed and a failure to deliver a portion of the logs. The suit as tried was compounded of two suits—one commenced on the 26th of January, 1866, and the other on the 25th of May, 1866, which were, on the 28th of June, consolidated by agreement.

The answer was in seven paragraphs. The first was the general denial; second, payment; third, that the plaintiff refused to perform his contract to saw, whereby the defendants were damaged one thousand dollars, which they demand as and by way of counter-claim; fourth, as to failure to deliver logs, that plaintiff had broken the contract by refusing to saw or let defendants take away their lumber sawed. The fifth paragraph need not be noticed, inasmuch as it has no bearing upon any question here. The sixth

paragraph was, that the defendants delivered five hundred logs, which the plaintiff sawed so badly and unworkmanlike that the lumber made was worthless, and the plaintiff refusing to saw properly, the defendants, as they lawfully might, refused to deliver more logs. The seventh need not be noticed. The plaintiff replied by general denial.

On the trial, after the defendants had offered evidence tending to show the unworkmanlike character of the sawing done, by proving that the lumber sawed was bad, the plaintiff offered evidence tending to show that the logs of which the lumber was manufactured were of such a character that good lumber could not be made of them. (The court here passed upon a question of practice and continued.)

The verdict was for the plaintiff, assessing his damages at \$836.40, and it appeared by answers of the jury to interrogatories submitted to them that they made up the aggregate of damages thus assessed as follows : balance not paid on lumber sawed \$393.50, and \$442.90 damages for failure to deliver logs as per contract.

There was evidence showing that before all the logs which the defendants had delivered were sawed, the plaintiff sold his saw-mill to one Pollard and delivered the possession thereof. The contract of sale was in writing and contained the following clause:

"Said Pollard on his part agreeing to finish and wholly complete the contract heretofore entered into between said Johnson, of the one part, and Wood & Foudray, J. W. Browning and Jacob P. Dunn, of the other part, on the 3d day of January, 1865; said Johnson agreeing to pay Pollard for finishing the contract between him and Jacob P. Dunn, in said contract mentioned, and on the same terms and payments therein mentioned; Pollard to look to the remaining parties, Wood, Foudray & Jones, the successors of Dunn & Love, for his payment for finishing and completing said contract."

As the contract to furnish logs was several, we construe this agreement to look to the other parties to refer to the payment for sawing done for them individually under the contract.

This contract was signed on the 6th of February, 1866, and it provided that Pollard should receive possession of the mill on the following day.

The court instructed the jury, that "the fact that the plaintiff sold his mill after he was notified by the defendants that they

would pay for no more sawing and deliver no more logs, or that he made a sub-contract with some other person to saw the logs that might be delivered, cannot affect the right of recovery, or the measure of damages."

It is insisted that this instruction was wrong; that as Johnson was to let Pollard receive the full amount of the contract price for the sawing, no possible profit could have resulted to Johnson, if the contract had been completed and the logs furnished; in other words, that the measure of damages between Johnson and the defendants is to be fixed by the profits he might have realized by a sub-contract with a third party to do the work. But if Pollard had contracted to do the work for half its actual value, it would not seem reasonable to charge the defendants with the consequences of Pollard's folly—to impose upon them a liability for damages which resulted, not from the breach of their contract, but from the shrewdness and skill of the other contracting party in dealing with a third person. Plainly such consequences are not contemplated when parties enter into a contract, which by reason of some misfortune they may be unable to complete; but they consider rather the usual cost of the work for which they contract to pay, and regard their liability as limited by the margin between such cost and the contract price. Johnson had no power by any sub-contract he might make with Pollard, either to increase or diminish the damages resulting from a violation by the defendants of their contract. Those damages must be determined alone from, and regulated by, the terms of the contract into which the plaintiff and defendants voluntarily entered.

Independent of authority, it would seem to be a reasonable and just rule, that on the breach of an executory contract like the present, the measure of damages should be the difference between the contract price of the work to be done and the reasonable cost of the work at the usual and ordinary prices. This rule would be just; for it fixes such damages on the breach of the contract as the parties are presumed to have had in contemplation at the making of it. It would be fixed and certain, and not a sliding scale to be moved at the will of either party; for it is not affected by the subsequent contracts of one party with third persons. It would be equal and uniform, measuring by the same standard the rights of the close and the charitable, the shrewd and the simple.

This rule is approved by reason, and is also established by

authority. In the case of *Masterton v. The Mayor of Brooklyn*, 7 Hill, 81, decided in the circuit court by KENT, and in the supreme court by NELSON, C. J., approved in *Story v. N. Y. & Harlem R. Co.*, 6 N. Y. 85, and in *Seaton v. The Second Municipality*, 3 La. Ann. 44, and quoted with approval by Sedgwick, in his excellent treatise, page 73, the learned chief justice says:

"Profits or advantages which are the direct or immediate fruits of the contract between the parties * * * are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement."

The plaintiffs in that case had a contract with the city authorities of Brooklyn, by which they agreed, for a certain stipulated price, to furnish and deliver marble to build a City Hall in Brooklyn, from Kain & Morgan's quarry in East Chester. They also had made a collateral contract with Kain & Morgan to furnish them the marble at a certain price. It was contended there, as here, that the measure of damages on a breach of the contract by the city authorities, was the difference between the price the plaintiffs were to receive from the city of Brooklyn, and the price they were to pay Kain & Morgan. Upon this point the chief justice says:

"It will be seen that we have laid altogether out of view the sub-contract of Kain & Morgan, and all others that may have been entered into by the plaintiffs, as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject matter of consideration at all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control or participation in the making of the sub-contracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these sub-contracts present a most unfit, as well as a most unsatisfactory basis upon

which to estimate the real damages and loss occasioned by the default of the defendants."

In the case of *Story v. N. Y. & H. R. R. Co.*, 6 N. Y. 85, where the same principle contended for by the appellants in this case had been adopted in ascertaining the damages, the court said:

"This rule of damages was fully considered in the important case of *Masterton v. The Mayor, etc., of Brooklyn*, 7 Hill, 61, and held not only to be entirely inadmissible, but that a sub-contract could not be taken into consideration, as an item of evidence in estimating the profits of the principal one. The reasons given by the learned chief justice for laying it entirely out of view are full and satisfactory."

Sedgwick, in speaking of the class of contracts to which the one sued on belongs, says:

"It appears to be settled in regard to this class of agreements, that the contractor is entitled to recover the profits he has lost by the default of the other party to the undertaking; that in estimating these profits, his sub-contracts are not to be taken as evidence thereof; but they are to be arrived at by taking the market value at the time of the breach, and if there be no market value, then by a minute inquiry into cost of materials, the expense of transportation, and the amount and value of labor required." Sedgw. Dam. 364.

It seems to us that the instruction given was correct, even if we place out of view the question, whether the notice given by the defendants, that they would pay for no more sawing and furnish no more logs, did not authorize this action by the plaintiff to recover for a violation of the contract, as was ruled in *Morrison v. Lovejoy*, 6 Minn. 319.

It is complained that the court below erred in the eighth instruction, which was as follows:

"The rule of damages as to profits, in case you find the defendants committed a breach of the contract without sufficient cause, is, that the plaintiff in such case would be entitled to the reasonable profits he would have made upon the contract if it had been carried out. To ascertain the profits, there should be deducted from the total amount the plaintiff would have received, the cost of doing the work, in labor, in wear and tear of machinery, in time, of use of machinery, and value of superintendence, according to

the evidence in the case. The balance will be the profits and damages to which the plaintiff would in such case be entitled."

Very closely in point is the case of *Morrison v. Lovejoy*, *supra*. Plaintiffs agreed to run and use for manufacturing lumber, exclusively for the defendants, certain mills, situated at Saint Anthony, from the date of the contract till May 15th, 1860, and the defendants agreed to furnish a sufficient quantity of logs to keep said mills in full operation during said period, and to pay plaintiffs at the rate of five dollars per thousand for sawing pine lumber, and seven dollars per thousand for hard wood. The action was brought to recover an alleged balance, and also damages by reason of defendants refusing to furnish logs to keep said mills in operation.

The case was very fully argued by counsel on both sides, and after a thorough discussion of the authorities the court said:

"When one party to an executory contract like that on which this action is brought refuses further to comply with it on his part, the other party has an immediate cause of action for said breach; and he may sue on it at any time and recover the damages which he may have sustained by being deprived of the benefits accruing to him under it.

"If he treat the contract as ended and sue immediately upon its breach, his damages are to be measured by the value of the contract to him at the time it was broken; and this value is estimated by the profits he would have realized during the continuance of the contract had it been faithfully carried out by the parties. But in estimating the profits which a party under such a contract would realize, allowance must be made for every item of cost and expense necessarily attending a full compliance on his part. If, therefore, the contract is for manufacturing a given article, and mills and machinery are necessarily employed in making it, the reasonable or usual rent, or value of the use of such mills or machinery, enters into the cost of manufacture, and should be taken into consideration in estimating the profits, because the profits are as directly affected by such expenses as by any other."

In the language of *Fox v. Harding*, 7 Cush. 516, "if the profits are such as would have accrued and grown out of the contract itself as the direct and immediate fruits of its fulfillment, they form a just and proper item of damages to be recovered against the delinquent party on a breach of the agreement." *Cunningham v. Dorsey*, 6 Cal. 19; Mayne on Damages, 16.

Dunn v. Johnson.

But appellants insist that this rule allowing the contractor to recover profits is confined to "parties who undertake to construct public works on a large scale, such as railroads, canals, or government buildings; and we are cited to Sedgwick on Damages, 364, as authority for this distinction. But it will be observed that the first illustration of the application of this rule given by the author is a trivial contract between private parties, where a millwright agreed to put machinery into the plaintiff's mill in a good and workmanlike manner, and for his failure he was held liable for such additional sum beyond the cost of repairs as the mill would have been worth to the plaintiff if the defendant had fulfilled his contract, more than it was worth while the machinery was insufficient.

But the law can recognize no distinction between public and private contracts; between the large and the small. To contracts of the same class the same law must be applied.

We are cited to *Jones v. Van Patten*, 3 Ind. 107, where it was held, that "the plaintiff should have had such damages as would have placed him in as good a condition at the time the contract was broken as he would have been in had he not made the contract."

In fine, he may be compelled to rescind by the wrongful act of the other party. His contract may have been of great value to him, and yet he is to receive no damages for its violation, no compensation, but simply be placed in the same position as though he had never made the contract, and this for no default on his part. This, in our opinion, never was the law.

But it is urged that the question of damages depends upon the loss of time incurred by the violation of the contract; that if the plaintiff could have procured other work from which profits would have accrued, such profits should have been deducted from his estimated damages.

This is doubtless true, but the matter is with the defendant to prove in reduction of damages. *Costigan v. The Mohawk & Hudson R. R. Co.*, 2 Denio, 609. In *Hamilton v. McPherson*, 28 N. Y. 72, it is said: "The burden of proving that the damages which have been sustained in such cases could have been prevented, unquestionably rests upon the party guilty of the breach of contract." The defendants introduced no such proof, but the plaintiff was prepared to perform his contract.

It is objected that the first suit was brought too soon; but the

Brumfield v. Carson.

second action, with which it was consolidated, covered the claim included in the first.

It is claimed that the plaintiff violated his contract by a refusal to deliver lumber sawed, on the 18th of January. But the finding of the jury that the sawing of the lumber was not paid for is conclusive on this point.

Judgment affirmed, with one per cent damages and costs.

BRUMFIELD *et al.*, appellants, v. CARSON *et al.*

(23 Ind. 94.)

Statute of frauds—interest in real estate—church edifice.

The right to use a church edifice to worship in when unoccupied by the church to which it belongs, is an interest in real estate, and a contract therefor, to be valid under the statute of frauds, must be in writing, signed by the party to be charged.

ACTION ON contract. The appellants filed a complaint in the court below against the appellees for specific performance of the following writing :

“ABINGTON, May 1, 1854.

“We, whose names are here inserted in this book, promise to pay, or cause to be paid, to the trustees of the Evangelical Lutheran and United Brethren in Christ Churches, for the sole purpose of erecting a church edifice in Abington for said societies, which is to be free for all Christian denominations to worship in when unoccupied by themselves, by making application to the trustees. Subscriptions to be paid on or before Christmas, 1854.”

This paper was signed by the appellants and others as contributors to the fund for the erection of the church edifice. It was not signed by either of the church corporations for which it was built. The complaint is, that one of these societies has relinquished to the other their entire interest in the building; that the trustees of the church now owning the property refuse to allow other Christian denominations to worship in the building when unoccupied by themselves. But the appellants are not members of either of the churches for which the church edifice was erected, but were subscribers and contributors to the fund for the erection thereof and members of other Christian churches.

Whitney v. Ragsdale.

A demurrer was sustained to the complaint. The appellants then added a new paragraph, and asked for a mandate. A demurrer was also sustained to that paragraph. The action of the court below in sustaining these demurrers presents the questions involved in this appeal.

J. B. & J. F. Julian, for appellants.

W. A. Peelle & H. C. Fox, for appellees.

GREGORY, C. J. The right claimed, to use the church edifice to worship in when unoccupied by the church to which it belonged, is an interest in real estate, and a contract therefor, to be valid under the statute of frauds, must be in writing, signed by the party to be charged. This paper is not so signed. That it was signed by the appellants is not enough. In *Laythoarp v. Bryant*, 2 Bing. N. C. 735, TINDAL, C. J., remarks, "It is said, unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's."

The principle, that the contract must have the signature of the party sued, was recognized in *Smith v. Smith*, 8 Blackf. 208.

Clearly the facts charged do not make a proper case for mandate. The court committed no error in sustaining the demurrers.

Judgment affirmed with costs.

WHITNEY *et al.*, appellants, v. RAGSDALE, Treasurer.

(33 Ind. 107.)

Constitutional law — tax — national bank.

By an act of the Indiana legislature passed in March, 1867, shares of the capital stock of national banks within the State were taxed for that year, and the cashier of each bank was required to represent each stockholder in listing and valuing his stock. *Held*, that the statute took effect from the first day of January, 1867, that it was a valid exercise of the taxing power, and that it did not conflict with the constitutional requirement of "a uniform and equal rate of assessment and taxation."

INJUNCTION to restrain the collection of a tax.

VOL. V.—24.

The appellants filed their complaint in the court below, against the appellee, on the 29th of July, 1868. It alleged, that the plaintiffs were stockholders in the Second National Bank of Franklin, located at Franklin, Johnson county; the bank being organized under the national bank act of Congress. The amount of stock held by the plaintiffs, respectively, is stated; that from January 1st, 1867, to the filing of the complaint, all the capital of the bank was invested in United States bonds and stocks, except the banking house, on which all taxes had been paid; that under color of the act of the legislature, of March 15th, 1867, the board of commissioners of the county assessed a tax, for State and county purposes, on their stock in bank for the year 1867; that the assessment was placed on the tax duplicate; and that pursuant to precept placed in his hands, the treasurer was proceeding to collect the tax, with penalties, etc., by levy and sale of plaintiffs' property; that none of the plaintiffs were residents of Johnson county, E. G. Whitney, Wm. B. Whitney, Maria Whitney, and Thomas Reid, residing in Jefferson county, and all the others being citizens of Kentucky; that such had been their respective residences since prior to January 1st, 1867.

Prayer for perpetual injunction. The defendant demurred to the complaint. The demurrer was sustained by the court. Exception taken by plaintiffs.

The plaintiffs abiding their complaint, final judgment against them went on the demurrer.

Plaintiffs appealed.

T. A. Hendrick, O. B. Hord, A. W. Hendricks and A. E. Walker for appellants.

T. W. Woolen, D. D. Banta and C. Byfield for appellee.

RAY, J. (after stating the facts). The only question in this case is, does the act of March 15th, 1867 (Acts 1867, p. 216), authorize the collection of such tax.

The appellants contend that the act should be construed as having prospective operation only, and not as authorizing any such tax for the year 1867, because it has been the course of legislation in this State to impose all taxes for the year upon property declared subject to it, as the same exists or is owned on the 1st day of

January in each year. That on the day named this property was exempt from tax, and therefore worth more than if it had been taxed. Giving the act in question a retrospective operation would take away this additional value.

But it cannot reasonably be insisted that this additional value was not subject to the pleasure of the legislature and liable at any moment to be taken away by the imposition of a tax. The argument results then in this, that as the legislature had not heretofore subjected property free from tax on the 1st day of January to such a burden at a subsequent date, we are therefore not to place such a construction upon this act as would result from a change of legislative practice.

To this may be answered, that the constitution of the State, article ten, section one, requires the legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," and that, therefore, where there has been a neglect of the legislature to comply with this requirement and impose the tax at the usual time, it is our clear duty to aid by reasonable construction any attempt by that body to supply such omission. Nor can it be said that such a construction deprives the owner of property thus omitted of any right. All property is by the constitution subject to this public burden, and it is also equitable that it should support its proportionate share.

That the tax was intended to apply for the year 1867, is evident from the language employed. The second section of the act requires the president or cashier of the bank to deliver a statement of the names and amount of interest of each stockholder to the proper county auditor on or before the fifteenth day of March in each year. The act was approved and went in force on that day. To enable bank officers to comply with the law for that year, however, the second section of the act declares, that "the sworn statement, required by the second section of this act, *may* be made for the year 1867, at any time on or before the first day of May, but for subsequent years *shall* be made within the time required by the said second section."

To construe the word "may" as simply permissive, would render the provision not only idle, but absurd. It would be an insult to the legislature to suppose that they intended to allow each bank to elect whether or not its stockholders should be taxed.

The next objection is to the law itself. While it is admitted

that this law is within the act of congress, it is contended that it is in conflict with a provision contained in the section of the State constitution already cited, requiring "a uniform and equal rate of assessment and taxation." The specification is, that as to the listing and valuing of all his other personal property, each owner is allowed to attend to it himself, but as to national bank stock, he is represented by an officer of the bank. But as to real estate, he makes no return or estimate of value. In that case, as in this, such return and estimate are made by another person under oath. But this objection was disposed of in the case of *The Louisville & N. A. R. R. Co. v. The State ex rel. McCarty, etc.*, 25 Ind. 177, where the point was made, that where the law provided a special method for the appraisement of the real estate belonging to a railroad, it was in contravention of the constitutional provision in question, and was, therefore, void. But this court, in deciding that case, sustaining the law, said: "The constitution does not require a uniform method of valuation of property, but only 'such regulations as shall secure a just valuation for taxation of all property, both real and personal.' The legislature must use a discretion as to the best method of securing a just valuation of property, and unless the method adopted be clearly inadequate to secure that result, we cannot question its action."

It is objected, again, that the act requires the stock to be taxed where the bank is located, irrespective of the residence of the owner. It is not contended that this violates any act of congress, but that it conflicts with the "general revenue system of the State." But we are referred to no provision of the constitution which prohibits the legislature from declaring that all national bank stock shall be taxed at the place where the bank is located, and that all shares in other corporations shall be taxed where the owners reside. The rate of assessment and taxation is still uniform and equal. That some of the stockholders are non-residents of the State, is no reason for this exemption from taxation. "It is not necessary that a person, to be amenable to the taxing power of the State, shall be a citizen of the State, or domiciled within it." *Board of Supervisors v. Davenport*, 40 Ill., 197.

The final fault found with the act in question is, that it is ineffectual, because it provides that an officer of the bank shall list the stock. It is contended, that such officer is "an officer of one of the fiscal agents of the general government" and therefore the

Ellis v. Wire.

duty cannot be imposed upon him. As the duty is not inconsistent with the trust imposed upon him as such officer of such fiscal agent, we are not prepared to admit his exemption from State authority by virtue of his position.

In this case, however, the tax has been assessed, and whether or not the act provides for extreme cases is not necessary for our consideration now.

Judgment is affirmed, with costs.

ELLIS, appellant, v. WIRE.

(28 Ind. 197.)

Conversion — evidence.

In an action to recover for the conversion of wheat, the defendant is not entitled to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages.

TROVER for the conversion of wheat. The facts appear in the opinion.

J. R. Slack, for appellant.

FRAZER, J. This was a suit, begun before a justice of the peace, by the appellant, for the taking and conversion of wheat and straw of the appellant by the appellee.

There seems to have been no controversy in the evidence concerning the plaintiff's title to the property. The defendant, however, forcibly took possession of it as it stood in the field, driving the plaintiff away, harvested and sold the grain for one dollar and seventy-five cents per bushel, and on the trial was permitted, over the plaintiff's objection, to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages. The question before us is as to the admissibility of this evidence. It was not admissible. The general rule in trover is, that the measure of the plaintiff's damages is the value of the property at the time of conversion, without any deduction for labor voluntarily bestowed upon it by the wrong-doer. *Ewart v. Kerr*, 2 McMullan, 141; *Jenkins v. McConico*, 26 Ala. 213. The time of

conversion is not, it seems, always fixed by the same circumstances. Thus, a tortious taking is sufficient proof of a conversion, but yet it appears from many of the cases that the plaintiff may elect to consider the property as still his own and treat a sale of it by the wrong-doer, or a refusal to deliver on demand, as the conversion. Or it has been held, that the law will, upon the principle of natural justice, that a wrong-doer ought not to be allowed to make a profit by his own willful tort, treat the conversion of property of fluctuating value as occurring at such time between the taking and the trial as the property bears the highest price in the market. The confusion in the cases seems in part to have arisen out of the form of the action, some courts and judges holding that by bringing trover the plaintiff precludes himself from showing that the taking was willful, and hence that the inquiry concerning damages must in all such cases, in that form of action, be confined to the value of the property at the time of conversion, without reference to the manner of the taking. In trespass, however, no such technical reason stood in the way, and, so far as we know, there is no conflict in the cases, where that was the form of action. Some loose ideas in reference to the time of conversion have also tended to darken counsel as to the measure of damages in trover, where the general rule that the value of the property at the time of conversion has been held to be a universal rule. A wrongful taking and a demand and refusal are each held in trover to be, not a conversion, but merely sufficient evidence of it. And yet nothing can be clearer than that these things do not change the title to the property; it still remains in the plaintiff, and may, by action of replevin, be recovered in specie, so long as its identity is perceptible to the senses. It may be so recovered, though its form has been changed and its value greatly increased by the labor of the defendant, as in the case of logs converted into plank, wool into cloth, cloth into clothing, leather into boots and shoes, and the like. It may in the new form be replevied, because it is, in that form, still the property of the plaintiff, and the defendant is not entitled to compensation for the labor bestowed upon it, for that was his own folly, and indeed he was a wrong-doer in the very act of adding such value to the property of another. The sale of the wheat was its actual conversion by the defendant, and its value at that time, in the form in which he sold it, was the measure of damages, if the plaintiff was content therewith; though we think he was entitled to the highest price of th

 Johnson's Administrators v. Hedrick.

property at any time between the taking and the sale. So are the English cases. *Greening v. Wilkinson*, 1 C. & P. 625. And such seems to have been the doctrine of the common law since the Year Books. See *Brown v. Sax*, 7 Cow. 95; *Betts v. Lee*, 5 Johns. 348; *Baker v. Wheeler*, 8 Wend. 505; *Silsbury v. McCoon*, 3 N. Y. 379.

It is held otherwise in Massachusetts, but the ruling is maintained there to preserve consistency of decision, and not because it was the doctrine of the common law. We do not like the Massachusetts rule, and if the question were *res integra* we would not adopt it, for the reason that it is too tender of the interests of the willful tortfeasor.

Reversed with costs.

Cause remanded for a new trial.

 JOHNSON'S Administrators, appellants, v. HEDRICK *et al.*

(33 Ind. 139.)

Administration—trust fund.

Where there is unnecessary delay in making a final settlement of the funds in the hands of administrators, interest will be required of them; and where they use the funds so retained in private speculation, they will be liable for compound interest.

ACTION against the administrators of the Johnson estate, to compel an accounting. The facts appear in the opinion.

B. F. Gregory, J. Harper and W. P. Rhodes for appellants.

J. Park and L. T. Miller for appellees.

GREGORY, C. J. The principal question involved in this case is as to interest charged to the administrators, by the court below, on moneys in their hands during the execution of their trust.

There was a demurrer overruled to the complaint; but as no complaint was necessary, we have not examined the points made against it.

At the commencement of this proceeding, no "final settlement" of the estate had been made. A general balance had been found

due from the administrators, but there had been no order of distribution, and no payment made of such balance.

In *Dufour v. Dufour*, 28 Ind. 421, it was held, that by the term "final settlement" as used in section 116 of the act for the settlement of decedents' estates, is not meant merely an ascertainment of the final balance of cash in the hands of an executor or administrator; it comprehends, also, a payment of that balance, so as to leave nothing to be done to complete the execution of his trust.

The accounts of the administrators were referred to a master commissioner who reported to the court the amount he found due from them. In making up this report, the master charged interest after the lapse of twelve months from the granting of letters of administration, on balances in their hands as reported by themselves to the court, at periods ranging from ten months to five years, allowing credits from the time of actual disbursements.

It is claimed that the administrators were not in default, and that they are not chargeable with interest.

Administration was granted in April, 1853, the final report was made in 1864, and no step taken to procure the final order of distribution until the commencement of this proceeding in June, 1866. There was some \$3,000 of cash on hand at the commencement of the trust. The sale bill of personal property amounted to some \$12,000. The indebtedness of the estate was some \$6,000. There was no real estate reduced to assets, nor is there any reason shown by the record for any unusual delay in the settlement of the estate. There was proof that the administrators used the money of the estate in their private business.

In *Dufour v. Dufour*, *supra*, it was ruled, that when an executor has improperly kept the legatees out of the use of their money, he is liable for interest thereon, and mere delay in settling the estate is sometimes *prima facie* evidence of his having done so.

There was not only a delay of some ten years in making settlement, but there was proof that the administrators used the money of the trust in their own private speculations, and they refused to account to the master for the result of these speculations. *Schiefelin v. Stewart*, 1 Johns. Ch. 620, settles the rule as to the mode of computing interest in such cases. The master ought to have charged the administrators *compound interest*, making annual rests in the accounts for that purpose. But this is an error that did not

Frink v. Bellia.

injure the appellants, and no exceptions were taken to the master's report by the appellees.

There has been great delay in this case. It was commenced in the court below in 1866; it has been in this court some sixteen months. Great injustice has been done the appellees in withholding from them the money found due by the court below.

Under such circumstances we shall affirm the judgment, with costs, and ten per cent damages.

Judgment affirmed.

FRINK, appellant, v. BELLIS *et al*.

(33 Ind. 185.)

Parties to action—covenant of warranty.

The heirs of real estate cannot sue upon a covenant against incumbrances broken during the life of the person under whom they claim the estate. The administrator is the proper party plaintiff.

ACTION to recover for breach of covenant as to land. Joshua T. Bellis for himself and as next friend of Nannie Bellis, an infant daughter, brings this action, alleging that the plaintiffs are the only heirs-at-law of Julia A. Bellis, deceased, who at her death was the wife of the one and the mother of the other; that in April, 1862, defendant, Frink, for a valuable consideration, conveyed certain real estate, which is described, by general deed of warranty, to one Johnson; that when said deed was executed, there existed a mortgage lien upon the land so conveyed; that afterward the defendant's vendee, Johnson, conveyed by warranty to one Hamlin, who, for a valuable consideration, by like deed, conveyed the property to said Julia A. Bellis; that afterward, on, etc., "while said Julia A. Bellis was still the owner of said lots under and by virtue of said deeds," the mortgage was foreclosed and the premises sold, and said plaintiff, Joshua T. Bellis, paid the sum of \$711, whereby the covenants of warranty were broken, and the defendant became "liable on the same to said Julia A. Bellis and her heirs."

A second paragraph avers, that to prevent a sale, the plaintiffs discharged the mortgage lien, but it does not appear that this was

done after the death of Julia A. Bellis. A demurrer was filed to each paragraph of the complaint, and overruled, and error is thereon assigned.

H. G. Porter, B. Harrison and W. B. Fishback, for appellants.

J. T. Dye and A. C. Harris, for appellees.

RAY, J. (after stating the facts). The single question presented by the complaint, is whether the heirs may sue upon a covenant against incumbrances, broken during the life of the person under whom they claim the estate.

The appellee admits that the case of *Martin v. Baker*, 5 Blackf. 232, holds that the heir must sue, but insists that the law has been held otherwise, and cites us to Rawle on Covenants for Title, p. 336, 3d ed., where it is said: "But with respect to covenants, although until breach, they, equally with the warranty, passed to the heir with the land they were intended to protect, yet if a breach had occurred in the lifetime of the testator, they then became choses in action, incapable of transmission or descent, and whose right survived to the executor alone."

This, we think, is the law beyond reasonable question, and certainly nothing to the contrary was ruled in *Martin v. Baker*, *supra*, where it was said, "with respect to the second covenant set out in the declaration, viz., for quiet enjoyment against incumbrances, it may be observed that if the administrator cannot sue on the first covenant (of seisin), without averring a special damage to his intestate, it follows necessarily that, without such an averment, he cannot sue on the second." The reason given why the administrator might not sue on the covenant for seisin, without averring special damage to his intestate, is, that the heir and the administrator both cannot maintain the action. "There cannot be two recoveries against the grantor for the same breach of covenants, and for the same damages." It of necessity follows that where the special damage is to the intestate, the administrator and not the heir must sue.

Here, the full damages from the breach of the warranty occurred during the life of the intestate, and the administrator alone could sue. The covenant broken and the ultimate damages occurring to and during the life of the intestate, the covenant could no longer

Mousler v. Harding.

run with the land and descend to the heir. The demurrer should have been sustained to each paragraph of the complaint.

Judgment reversed, with costs, and the cause remanded for proceedings accordingly.

MOUSLER and WIFE, appellants, v. HARDING.

(33 Ind. 176.)

Slander—evidence—malice—husband and wife—witness.

In an action for slander the fact that the words were spoken in the heat of passion, or under excitement, may be shown in mitigation of damages, but not in bar of the action.

Malice is essential to render slanderous words actionable, but when words actionable in themselves are spoken in a criminal sense, and are false, malice is implied from the speaking.

When husband and wife are by statute excluded as witnesses "for or against each other," in an action against them for slanderous words spoken by the wife, she is a competent witness in her own behalf, and (ELLIOTT J. dissenting) he is a competent witness in his own behalf.

ACTION by Sarah A. Harding against Herman Mousler, and Nancy, his wife, for slanderous words spoken by the wife against the plaintiff. The fourth paragraph of the answer mentioned in the opinion of the court was as follows: "That before uttering the words stated in the complaint the plaintiff, in presence of Mrs. Nelly Stening and other persons stated that she loved said Herman and detested said Nancy; that she and said Herman were on the most intimate terms, and that said Herman visited her at her room, and that she could and would separate the said Nancy and Herman. Which statements came to the knowledge of said Nancy, and she being greatly provoked and grieved thereby, uttered said words without malice." This was pleaded in bar of the action. A demurrer thereto was sustained; whereupon defendants excepted. Verdict for plaintiff for \$200; motion for new trial denied; judgment on verdict, and appeal by defendants.

W. S. Holman for appellants.

S. M. Jones and *J. W. Gordon* for appellee.

ELLIOTT, J. The ruling of the circuit court in sustaining a demurrer to the fourth paragraph of the appellants' answer presents the first question upon which a reversal of the judgment is claimed.

That paragraph admits the speaking of the slanderous words charged in the complaint, but fails to justify them, or show by the averment of proper facts that they were not spoken in the slanderous sense charged in the complaint. The fact alleged in the paragraph, that the words were spoken when said Nancy was provoked and excited by what she was informed had been said concerning her and her husband by the plaintiff, is not sufficient to rebut the presumption of malice arising from the speaking of the slanderous words charged, they being false in fact. That the words were spoken in the heat of passion or under excitement, might properly be shown in mitigation of damages, but not in bar of the action.

The appellants requested the court to instruct the jury as follows:

"1. If, upon the consideration of the whole evidence, it appears that the words were spoken in the heat of passion, without malice, and, if repeated, were repeated without malice, you should find for the defendants."

"2. While the speaking of actionable words implies malice, it is still proper that you consider all the evidence in the case in determining the question whether the words that may have been proved to have been uttered were uttered maliciously or not. If they were not uttered maliciously, you should find for the defendants."

The instructions were refused, to which the appellants excepted.

This ruling of the court is also urged as being erroneous.

We think there was no error in refusing to give the instructions as asked. They involve the same question, in substance, as that presented by the fourth paragraph of the answer, and what has been said in discussing that paragraph applies with equal force to these instructions. It is true, that malice is essential to render slanderous words actionable, but it is not the settled doctrine, that when words actionable in themselves are spoken in a criminal sense and are false, malice is implied from the speaking.

The instructions given by the court to the jury are in the record, and contain a full and fair statement of the law arising upon the pleadings and evidence in the case.

The only remaining questions in the case are based on the refusal of the court to permit either of the appellants to testify as a witness in the case.

Mousler v. Harding.

It appears by a bill of exceptions that, at the proper time, the appellant Nancy offered herself as a witness in her own behalf in said cause, and offered to testify to the facts in mitigation of damages, set forth in the second and third paragraphs of the answer, and also that the slanderous words imputed to her in the complaint were not spoken by her; but the plaintiff objected to her being permitted to testify in the cause, for the reason, that, being the wife of Herman Mousler, the other defendant in the action, she was not a competent witness to prove any fact in the cause on behalf of the defense, which objection the court sustained, and refused to permit her to testify to any fact for the defense.

The appellant Herman also offered himself as a witness in his own behalf on said trial, and also offered to testify to the facts alleged in mitigation of damages in the second and third paragraphs of the answer, and that at the timesaid Nancy uttered the slanderous words charged in the complaint, she was laboring under great excitement, occasioned by rumors of certain defamatory words said to have been spoken by the plaintiff of her, said Nancy, and further, that he caused said Nancy to go with a mutual friend to the person to whom the words were spoken, to retract the same. But the evidence was rejected by the court, on the ground that said Herman, being the husband of his co-defendant, was not a competent witness in the case for the defense, and could not be permitted to testify therein to any fact for the defense. Proper exceptions were taken to these rulings.

The statute excludes the husband and wife as witnesses "for or against each other," but does not prohibit each from testifying in his or her own behalf; and when they are united in the same action, the evidence of one of them cannot be considered in determining the issue for the other.

In this case, we all concur in the opinion that the wife was a competent witness in her own behalf, and three of the judges unite in the opinion that the husband was also a competent witness for himself. In this opinion I cannot concur.

In *Carnie v. Murphy*, 28 Ind. 88, which was an action by husband and wife against a physician for malpractice in the treatment of the wife, the action sounding in tort, the court was equally divided on the question as to the right of the wife to testify as a witness.

And so in *Ward v. Colyhan*, 30 Ind. 395, which was a suit by husband and wife for slanderous words spoken of the wife, this

court was equally divided, as to the right of the wife to testify as a witness in her own behalf.

But in the case of *Albaugh v. James*, 29 Ind. 398, which was a suit against husband and wife, for the abduction of the wife of the plaintiff, it was held, that the defendants had each the right to testify in his or her own behalf, and that the fact that the testimony of one might tend to benefit the other is no reason for excluding the evidence; but it would be the duty of the court, by instructions, if asked, to limit the effect of the testimony to the case of the party testifying. See, also, *Crane v. Buchanan*, 29 Ind. 570.

In the case now before us, the cause of action is against the wife, for slanderous words spoken by her. The husband is properly joined as a party, and is responsible for the damages that may be recovered, but his liability is simply an incident of the marriage relation, and not for any act of his own; and if he should die pending the suit, the action would survive against the wife alone, and not against his personal representatives. The facts to which the husband offered to testify were in mitigation of the damages, and relate exclusively to the wife and her conduct, except the fact that the husband caused the wife to go to the person to whom she had uttered the slanderous words and retract the same; but this act of the husband, however meritorious, could not go in mitigation of the damages, and hence, was not proper evidence. *Yeates v. Reed*, 4 Blackf. 463. If the words were spoken in the heat of passion, and the wife afterward went to the person to whom they were uttered and retracted the slanderous charge, such facts would be proper evidence for the wife in mitigation of damages. All the proper facts offered to be proved by the husband, in mitigation of damages, were direct evidence for the wife, and not for the husband, except as they might incidentally and unavoidably tend to release his liability resulting from the marital relation. The wife, in my opinion, has the right to testify, because the cause of action is directly against her, and for her individual act, and she would therefore be testifying directly for herself; and the fact that her evidence might incidentally and unavoidably tend to benefit the husband, would be no reason for excluding it. But the husband's position is just the reverse; his evidence would be directly for the wife, and only incidentally for himself, and for that reason would, in my opinion, be incompetent.

Judgment reversed, with costs, and the cause remanded for a new trial.

PATTISON, appellant, v. CULTON *et al.*

(33 Ind., 240.)

Vendor and vendee — conditional sale — stoppage in transitu.

Where goods are sold on condition that title shall not pass until they are paid for, the vendor retains the right of stoppage *in transitu* as against the vendee, or an innocent third person who purchases of the vendee before the arrival of the bill of lading or the goods.

ACTION of replevin by Pattison against Culton *et al.*. The facts appear in the opinion.

A. G. Porter, B. Harrison and W. P. Fishback for appellant.

F. Rand and R. H. Hall, for appellees.

FRAZER, J. We are of opinion that the damages assessed were not excessive.

The case made by the evidence, viewed in the most favorable light to sustain the verdict, as it is our duty to view it, was this: During the forenoon of August 29th, 1867, the plaintiff, Pattison, purchased, at Indianapolis, from H. W. Comstock & Co., forty-seven thousand pounds of wheat and paid for it, taking at the time from them a bill of lading for the property, issued by the Indianapolis, Cincinnati and Lafayette R. R. Co., at Indianapolis, on that day, to H. W. Comstock & Co., on account of Pattison. The wheat was at the time in transit from Chicago to Indianapolis, arriving the night of the 30th, though Pattison supposed it had arrived, and, indeed, the shipping list had been received. He had no notice of any right of the defendants to the wheat. The wheat had been shipped from Chicago by the defendants on the 28th, consigned, according to the bill of lading in duplicate taken by them, to H. W. Comstock & Co., at Indianapolis, *on account of the defendants*. The wheat was contracted by the defendants to H. W. Comstock & Co., but was not to be theirs till paid for. The defendants drew at sight on H. W. Comstock & Co. for the price of the wheat, under date of the 28th, attaching to the draft one copy of the bill of lading endorsed, and negotiated the draft at a Chicago bank, which transmitted it to an Indianapolis bank for collection. The draft reached the latter city about the same hour

that Comstock & Co. sold the wheat to Pattison. An attempt was instantly made to present the draft, but the drawees could not be found. They were insolvent and failed that day. At three o'clock, P. M., the Indianapolis bank notified the carrier to hold the wheat for the consignors. A similar notice was given later, but on the same day, at the express instance of the defendants; and the wheat was accordingly held until taken by the writ of replevin issued in this suit. The question is, had Pattison a right to possession of the wheat?

A bill of lading is a muniment of title and *quasi* negotiable. But Comstock & Co. did not possess this evidence of title, and, of course, did not indorse it to Pattison; and herein is found an important difference between this case and *Coze v. Harden*, 4 East, 211; *Dows v. Greene*, 32 Barb. 490; *Lee v. Kimball*, 45 Me. 172, cited by the appellant. In *Whitehead v. Anderson*, 9 M. & W. 518, there is language to the effect that if the carrier enters into a new agreement with the consignee, distinct from the original contract for carriage, to hold the goods in custody as his agent, subject to some new order to be given, then the goods are constructively in the possession of the consignee, and the right of the vendor to retake them is gone. But it must be borne in mind that the learned baron was speaking of a case in which the goods had arrived at the port of destination, and the sole question was, whether after such arrival the assignee in bankruptcy of the consignee had done such acts as amounted to a constructive possession, thus terminating the transit and making the carrier his mere bailee for the custody of the goods. It was not an attempt, having no bill of lading or other muniment of title, to sell the goods while in actual transit, as in the case before us.

But in the present case, Comstock & Co., at the time of the sale to Pattison, not only had no actual title to the property, by the very terms of their contract with the appellees, but they possessed no indicia of ownership, neither possession nor the bill of lading, and the wheat was yet upon its voyage. Pattison took not only the risk of stoppage, but also the risk of the title of his vendors, without any act of the appellees to mislead him. If he had found Comstock & Co. possessed of an ordinary bill of lading sent to them by their vendors, indicating ownership by the former, he might have safely purchased, and there would be both reason and authority in abundance for holding that the consignors, having

The Bellefontaine Railway Co. v. Hunter.

thus put it in the power of Comstock & Co. to exhibit evidence of title, should not afterwards as against him question that title. A mere resale by the vendee does not, however, destroy the right to stop, and we know of no case in which it has been held to do so. 2 Kent Com. 547, and cases there cited in the note.

It is argued that if the right of stoppage existed, it was not in this case well exercised. We are not able to concur in this proposition.

Affirmed, with costs.

THE BELLEFONTAINE RAILWAY Co., appellant, v. HUNTER, Admr.

(33 Ind. 385.)

Evidence—res gesta—railroad—negligence.

In an action against a railroad company to recover for causing the death of plaintiff's decedent, *held* (1), that the declarations of the fireman of the train which caused the death, made soon after the accident, as to the speed of the train, the position of the deceased, and the giving of the customary signal, were inadmissible; (2) that it is negligence for one approaching a railway crossing not to use the sense of sight and hearing to discover a coming train, and that, in the absence of special statute, the omission of all signals at crossings is not negligence *per se* on the part of the railroad company.

ACTION against the Bellefontaine Railway Company by Hunter, administrator, to recover for causing the death of plaintiff's decedent, William H. Hunter. At the trial it appeared that Hunter, the deceased, was approaching a crossing of the railroad, with knowledge that the train was nearly due, and in possession of the senses of sight and hearing; that the noise of the approaching cars could be distinctly heard on the road to the crossing; that the train was visible to a person on the highway thirty feet south of the crossing; that the train was running from thirty to forty miles an hour; that the train gave no signal; and that the train ran upon Hunter as he was crossing the track in his wagon, whereby he was injured so that he died almost immediately. Plaintiff offered to prove the declarations of the fireman as to the speed of the train, the position of deceased, and the giving of the customary signal, made on the arrival of the train bearing the body of deceased at the next station. Defendant objected, but the court admitted the

evidence; whereupon defendant excepted. The instructions asked for and given, which are referred to in the opinion of this court, are as follows:

Instructions asked for and refused :

"5. The accident in this case took place at the intersection of the railroad track and a public highway, and it is the duty of a traveler approaching a railroad crossing to look along the line of the track, if possible, and see if any train is coming; and if you find, from the evidence, that the deceased failed to take such precautions before the happening of the accident, then he was guilty of negligence, and you will find for the defendant.

"6. A traveler approaching a railroad crossing on the public highway is bound to exercise ordinary care, and vigilance, and foresight, in proportion to the danger to be avoided and the fatal consequences involved in his neglect. His vigilance should be quickened, not slackened, by the fact that he could not see the track sideways to any distance till he got on the track. And if the decedent could not see an approaching train by reason of any obstruction to the view, then he was called to greater care and watchfulness in driving upon the track than if the view had been open. *And if he heard, or in the exercise of ordinary care and watchfulness might have heard, the noise of the coming train, and then drove upon the track, without first fully ascertaining that there was no danger from collision, he was guilty of negligence, and you will find for the defendant.*"

No. 6 was given after part in italics was stricken out by the court.

"7. It is not enough to entitle the plaintiff to recover in this action, that he established the fact that the defendant neither rang the bell nor sounded the whistle. If you find these facts proved by a preponderance of testimony, then it must further appear to your satisfaction that the accident was brought about by reason of this omission. And if the decedent had notice in any other way, of the approach of the train, either from a knowledge of the train time, or by notice given that the train was coming, or by the noise of the running train, that it was approaching, and with this knowledge heedlessly *and recklessly* drove upon the track without first apprising himself that he could cross in perfect safety to himself and the defendant, then the plaintiff cannot recover, and you will find for the defendant."

The Bellefontaine Railway Co. v. Hunter.

No. 7 was given after the words "and recklessly" had been inserted by the court.

"12. If the jury believe, from the evidence, that the collision resulted from the fault or negligence of both parties, and Hunter's fault was upon a point which he knew, or had reason to believe, would or might contribute to the injury, then the plaintiff cannot recover.

"13. If Hunter was guilty of negligence, or did not use ordinary care to avoid the injury, the plaintiff cannot recover in this case, unless the defendant has been guilty of such gross negligence as to imply a disregard of consequences or a willingness to inflict the injury, and from the consequences of which Hunter could not escape by reasonable diligence."

Instructions given:

"7. In the second paragraph it is charged that the defendant, by her agents and employes, caused the death of Hunter, by recklessly, wantonly, and with gross carelessness and negligence running the locomotive or cars upon or against him, he being without fault or negligence.

"8. Under this paragraph, if you find, from the evidence, that the agents or employes of the defendant in charge of the locomotive and cars, recklessly and wantonly, and with gross carelessness and negligence, ran the same upon or against William H. Hunter, thereby causing his death, the plaintiff will be entitled to recover, though the deceased may not have used ordinary care to avoid the injury, unless his failure to use ordinary care was upon a point his own negligence of which resulted in his death.

"11. Gross negligence is sometimes defined to be 'the absence of slight care, or that degree of care which every man of common sense, though very absent and inattentive, applies to his own affairs.' As applied in this case, to charge the defendant by her agents and employes with having recklessly, wantonly, and with gross carelessness and negligence, caused the death of Wm. H. Hunter, as set out in the second paragraph of the complaint, it must appear from the evidence that the negligence of the agents and employes of defendant was so gross as to imply a disregard of consequences or a willingness to inflict the injury.

"12. The term recklessness, as applied to management of the train, is such gross negligence as is utterly regardless of consequences.

The Bellefontaine Railway Co. v. Hunter.

"13. It was the duty of those in charge of the train of the defendant, when approaching the crossing, to give some signal, by ringing the bell, sounding the whistle, or otherwise, calculated to call the attention of an ordinarily prudent man passing on the highway to the approach of the train, unless you believe the railroad track to have been in such public view, or the noise made by the running of the cars sufficient to enable an ordinarily prudent man, exercising usual care, to have notice of the approach of the train and avoid collision. And it was their duty also to exercise care in running the train at a reasonable rate of speed; such a rate of speed as would enable a prudent man exercising ordinary care to avoid collision; and when it becomes evident that contact is liable to occur, it is their duty to use all reasonable means to avoid it. In this action, you must determine from the evidence what means were proper to be used, under all the circumstances of the case, to avoid the collision.

"14. It was the duty of the deceased, in charge of the horses and wagon, in approaching the crossing, to exercise such care as a person of ordinary prudence would, under similar circumstances, usually employ in looking out for the approach of the train and acting so as to avoid contact with it; and if you believe from the evidence that the exercise of such care would have prevented the accident, you will find for the defendant, unless you find that the collision resulted from such gross negligence and recklessness on the part of those in charge of the train as to indicate an entire disregard of consequences or a willingness to inflict the injury.

"15. If the jury believe from the evidence that no signal was given, before approaching Minnowa crossing, by the employes of the railroad company, and that the train was going at an extraordinary rate of speed, this did not justify Hunter in encountering the risk of crossing, if he saw or heard the approach of the engine or was otherwise satisfied of its presence in season to avoid the peril."

Verdict for plaintiff. Appeal by defendant.

J. T. Dye and *A. C. Harris* for appellant.

J. Hanna, *F. Knefler* and *N. B. Taylor* for appellee.

RAY C. J. (after stating facts and disposing of minor matters).

The Bellefontaine Railway Co. v. Hunter.

Upon the question of the admissibility of the reported statements of the fireman who was upon the engine at the time of the accident, it seems scarcely required that authorities should be cited. Such evidence was plainly improper. The appellant has cited us to *Luby v. The Hudson River R. R. Co.*, 17 N. Y. 131, where the precise question is decided.

This was an action for running a horse car over plaintiff in the street. A policeman was permitted to prove, over defendant's objection, that after the accident he arrested the driver, and that as he was getting off the car, and out of the crowd which had surrounded it, he asked him why he did not stop the car, to which the driver replied, "the brake was out of order." The court held: "The declarations of an agent or servant do not, in general, bind the principal. When his act will bind, his statements and admissions respecting the subject-matter of these acts will also bind the principal, if made at the same time, and so that they constitute a part of the *res gestæ*. To be admissible they must be in the nature of original, and not of hearsay evidence. They must constitute the fact to be proved, and not be mere admissions of some other fact. They must not only be made during the continuance of the agency, but in regard to a transaction pending at the very time. The declaration was no part of the driver's act for which the defendant was sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." The case was reversed for the error of admitting this evidence. *Moore v. Meacham*, 10 N. Y. 207; *Lane v. Bryant*, 9 Gray, 245.

It is insisted that even if erroneously admitted, still the evidence is not shown to have influenced the jury, and therefore the error may have been harmless. It is plain, however, that the rate of speed at which the train was moving did, whether properly or not, form an important element in leading the jury to the conclusion that the death resulted from the negligence of the appellant. The admission of White fixes the rate at the highest stated by any witness, and the jury have adopted his minimum, although no other witness testified to even that speed. But where error has occurred in the admission of improper evidence, it must affirmatively appear that no injury was caused by such error; and the action of the court below in overruling the motion for a new trial is not, as appellee

insists, presumptive evidence of the fact. The court below, doubtless, having admitted the evidence, overruled the motion for a new trial upon the ground that no error had occurred. Nor is the opinion of the judge trying the cause below, if accessible to us, as to the particular evidence which influenced the action of the jury, entitled to special consideration. Where improper evidence, material to the issue, has been admitted, the presumption is that it worked injury; and no mere matter of opinion or speculation will justify us in affirming a judgment rendered upon a verdict thus obtained.

This decision involving a reversal of the case, we will, without further question as to the completeness of the bill of exceptions regarding the evidence, proceed to examine the correctness of the instructions given, as applied to the evidence before us, there being no question that the instructions are fully stated.

In *The Toledo and Wabash Railway Co. v. Goddard*, 25 Ind. 185, the doctrine was stated thus: "Where negligence is the issue, it must be a case of unmixed negligence, to justify a recovery; and if both parties, by their negligence, immediately contributed to produce the injury neither can recover." The authorities then supporting the position were very fully stated. Later decisions have only confirmed the rule, which, indeed, rests upon the case of *Butterfield v. Forrester*, 11 East, 60, where Lord ELLENBOROUGH held, that "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."

In *The Lafayette and Indianapolis R. R. Co. v. Huffman*, 28 Ind. 287, the negligence on the part of the plaintiff which will defeat his action is again stated and applied, even when an infant is the injured party. The court below had instructed that if the servants of the company had failed, in the management of the train, to use such diligence and care as prudent and discreet persons should use, etc., and the plaintiff was injured, he was entitled to recover, unless from his own negligence or want of reasonable care he had brought the injury upon himself. The court say this is not law. It is not necessary that the negligence of the plaintiff should have "brought the injury upon himself." If it directly contributed to that result, it would have defeated the action, where the defendant was only chargeable with want of ordinary prudence. The following instruction given by the court below, viz.: "Although the

The Bellefontaine Railway Co. v. Hunter.

plaintiff was in fault, yet if the employes of the defendant might with reasonable diligence have avoided the injury, it was their duty to have done so; and their failure to do so would render the company liable," is thus disposed of: "That is not the law. Where the plaintiff is in fault, a want of reasonable diligence will not render the defendant liable."

In *The Indianapolis and Cincinnati R. R. Co. v. Rutherford*, 29 Ind. 82, the jury found specially that the injury (a broken arm) would not have happened if the plaintiff had kept his arm inside the car. Yet the jury gave the plaintiff a verdict of \$700 against the railroad company. The latter appealed. The court says: 'This judgment cannot stand. The place for the passenger is inside, not outside the coach. This is known to everybody who ever saw a railway car. Nothing is better settled than that in such a case, if the plaintiff's negligence has contributed to the injury he cannot recover.'

In *Telfer, Adm'r, v. The Northern R. R. Co.*, 30 N. J. 188, where the action was for killing the plaintiff's son, who was crossing the track of the defendant on a public road, it was said, "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case, the blame attaches *prima facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track." The court say, "whether the whistle was blown or bell rung upon the approaching engine, is immaterial, if the boys knew, or with ordinary caution might have known, in time to avoid the collision, that the train was approaching. Although the engineer saw the boys approaching the crossing, while yet at such a distance as not to indicate their ignorance of the coming train, it was his right to suppose they did not mean to attempt to cross before the train; and if he acted upon that impression, it was not negligence or want of ordinary caution on his part, although the supposition proved to be groundless." It is said that the law does not require that the speed of a railroad train should be lessened when crossing any other way, unless the track be concealed from view, or passing through some thronged street or highway. The railway is but a single track on which cars can run, and there is no limit to the speed except the safety of the train. All other conveyances are under more immediate control, and can turn to

the right or left or stop and avoid injury. "All persons and things are perfectly safe from collision except on this narrow track, and cannot be harmed unless they go upon the track; consequently, every person is under the strongest possible obligation not to venture upon that track when the cars are about to pass. If he do so and get hurt, it can scarcely be otherwise than that the risk and fault are his own. Nor does it make any difference how strongly the party may believe or suppose that he can cross with safety. If he gets hurt, the miscalculation was his own, and the consequences must rest upon him. Nor does it at all change the case that the party did not think of the cars. He was bound to think of them, if he knew the road was there. Nor is it any excuse that he was in a covered wagon, and did not see, or did not see fit to look; for a person cannot close his eyes or cover himself up in the midst of danger and then plead that he could not see. It is not a trifling matter to stop a train of cars where it would not otherwise stop, when it is running on time and is required to pass another train at a given point, and when the failure to do so might produce serious consequences. I do not think a conductor is bound to stop his train because he sees an individual standing on the track a quarter of a mile ahead of him; because he has every reason to suppose that he will leave the track before the cars reach him. Nor do I think he is bound to stop his train because he sees a vehicle slowly approaching the road, or quietly standing a few yards from it, with the horse's head towards it; for he has every reason to suppose that they will not attempt to cross until the train has passed.

If the engineer see a person on the track, to whom the train must be in full view, and there is nothing to indicate a want of consciousness or capacity, he would not be bound to stop his train. He would have the right to presume that the party would remove in time to avoid the danger. *The Philadelphia and Reading R. R. Co. v. Spearen*, 47 Penn. St. 300.

In *The North Pennsylvania R. R. Co. v. Heileman*, 49 Penn. St. 60, it is held to be the duty of the traveler approaching a railway crossing, to look along the line of the railroad track and see if any train is coming; and if he fail to take such precaution, it is more than evidence of negligence—it is negligence itself, and the court should so charge the jury.

This, indeed, is the true rule; for when it is determined as a legal proposition that one may not rush blindly upon the rails over which

The Bellefontaine Railway Co. v. Hunter.

trains are passing propelled by an agent serving its master almost at its own will, the neglect of this duty to use the physical senses is negligence, and not mere evidence of negligence.

In *Dascomb v. The Buffalo and State Line R. R. Co.* 27 Barb. 221, the facts were these: The plaintiff lived near and owned land on both sides of the New York Central Railroad. At four o'clock p. m. he was proceeding across the road, at what is called the Camp Road Crossing. The highway and the railway crossed nearly at right angles and at grade. The passenger train was then due. There is no evidence that those in the wagon looked for the train or took any precaution whatever. The result was that the wagon was struck, Dascomb's son killed, and he himself severely injured. The court say: "It should and must be regarded as very little short of recklessness for any one to drive on the track of a railroad without first looking and listening whether a moving train is near. The negligence of the defendant in this case was a failure to ring the bell or sound the whistle. Yet, as Dascomb was also negligent, he could not recover. Those living near a railroad may, by contact, become careless; but they will be no less chargeable with negligence in case they rush on the track without looking and trying to ascertain first whether danger is near. Failing in this respect, they cannot be permitted to recover for injuries received. It is a well settled principle of the common law, that he whose negligence has contributed in any essential degree to the injury sustained cannot maintain an action against the party whose negligence has also contributed to the injury. When negligence is the issue, it must be a case of unmixed negligence. This rule is important, salutary in its effects, and should be maintained in its purity. The careless are thereby taught that if they sustain an injury to which their own negligence has contributed, the law will afford them no redress."

If a party rushes into danger, which by ordinary care and prudence he could have seen and avoided, no rule of law or justice can be invoked to compensate him for the injury he may have so received. *Chicago and Alton R. R. Co. v. Gretzner*, 46 Ill. 74.

In *Ernst v. Hudson R. R. Co.*, 39 N. Y. 61, Judge CLERKE uses this language: "Any contributory negligence of a person attempting to cross a railroad track undoubtedly excuses the railroad company, whether the required signals are, or are not, given; or whether the company is or is not guilty of any other negligence." Judge CLERKE further adds, "the rule of this court is not ignored or modi-

The Bellefontaine Railway Co. v. Hunter.

fied by any former opinion, that where the injured party has not used ordinary care, there can be no recovery against the company."

Judge WOODRUFF repudiates the idea that the railroad company was legally bound to keep a flagman at that station; or that the omission to do so was negligence *per se*. "There is no such rule of law; no statute requires it." Again, "It is not denied that if the intestate (Ernst) was guilty of negligence, contributing to the injury, the plaintiff was not entitled to recover." Again, "A traveler is bound to use his eyes and ears as far as there is opportunity." "Negligence in the railroad company to give the proper signals, or in omitting precautions of any kind, will not excuse his (the traveler's) omission to be diligent in such use of his own means of avoiding danger." "And when by such use of his senses the traveler might avoid danger, though the company neglect to give signals or warning, yet his omission (to be diligent) is concurring negligence, and should be so peremptorily declared by the court."

A leading case on the question at issue is *Wilcox, Adm'x, v. The Rome, etc., R. R. Co.*, 39 N. Y. 358.

In that case, the intestate was crossing the track on Court street in the village of Watertown. The track and the trains on it were in plain sight for a distance of eighty rods. The street and the track cross each other at right angles. A special train came to the crossing at the rate of about fifteen miles an hour, without ringing the bell or sounding the whistle as it approached the Court street crossing. There was no signal man stationed at the crossing. While the deceased was on the track near the Court street crossing, and twenty-five feet inside the east line of the street, he was struck and carried forty-five feet. He died of his injuries.

The court held, that "where deceased was killed in attempting to cross the railroad track within the limits of the public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars in time to have avoided them, had he first looked before he attempted to cross, it will be presumed he did not look; and by omitting so plain and important a duty, he will be deemed to have been guilty of negligence, which precludes a recovery."

In the *Galena and Chicago Union R. R. Co. v. Loomis*, 19 Ill. 548, the court held, "that if without signals, the injured party might, with care, have seen the train and known that it was approaching, he could not recover. A failure to ring the bell or

The Bellefontaine Railway Co. v. Hunter.

sound the whistle does not raise a presumption that this was the cause of the injury." The omission of these signals is no more, and no less negligence, than the neglect of any other duty. It is neither gross negligence, nor culpable negligence, nor any other degree of negligence. It is simply and only negligence. *Chicago and Mississippi R. R. Co. v. Patchin*, 16 Ill. 198; *Galena and Chicago Union R. R. Co. v. Dill*, 22 Ill. 264; *Illinois Central R. Co. v. Phelps*, 29 Ill. 447.

In *Pennsylvania R. R. Co. v. Henderson*, 43 Penn. St. 449, it is held, that the injured party is charged with knowledge, or regarded as knowing, if he had such warnings and opportunities of knowledge as would, with ordinary caution in these circumstances, have saved him from the danger. This, we think, is a correct statement of the law, and under such circumstances the party must be held to have knowingly contributed to his own injury.

In *Beisiegel v. New York Central R. R. Co.* 40 N. Y. 9, it was held, that the common law does not impose the duty of warning by signals persons crossing their track, and that if the injured party by looking up the track, in the direction of the approaching train, could have seen it in time to have avoided the injury, his omission to do so was negligence.

In *Havens v. The Erie R. R. Co.* 41 N. Y. 296, it was declared, that where the statute required signals to be given by the company on approaching a railroad crossing, and they were omitted, yet such omission did not absolve the person approaching such crossing from looking up and down the track, to see whether a train was approaching; and his omission so to do precluded his recovery.

In *Baxter v. The Troy and Boston R. R. Co.*, id. 502, it is said, "The law requires care at all times when in a situation of danger, and mental absorption or revery, from business, grief, etc., will not excuse its omission. The inquiry is whether, from the evidence, it satisfactorily appears that the plaintiff, by looking, could have seen the train in time to have avoided the collision. If so, the plaintiff should have been non-suited."

In *Stubley v. London and N. W. R. W. Co.*, L. R. 1 Ex. 13, defendant's track crossed a much traveled foot-way; on each side was a swing gate some distance from the rails; at the west, owing to the pier of a bridge, a person could not see a coming train for over thirty yards south, but by going within the line and within about nine feet of the track he could see three hundred yards each

The Bellefontaine Railway Co. v. Hunter.

way. The deceased came from the west to cross, and was detained by a freight train passing south. As soon as it had passed she proceeded to cross behind the train, and just as she reached the east track was struck down by an express train from the south, which she had not observed.

POLLOCK, C. B., said, "The track is of itself a warning of danger to those about to go upon it and cautions them to see whether a train is coming. There was no evidence to go to the jury."

BRAMWELL, B., said, "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended."

In *Butterfield v. The Western R. R. Co.*, 10 Allen, 532, the "plaintiff was acquainted with the highway and railroad. If he had looked he would have seen the train. It came from the west, and for a half a mile west of the highway the track was in plain sight. It was a stormy night, raining, blowing hard from the northwest, and snowing some. He had his hand up holding his hat on his head and this prevented him from seeing the train. He was listening for the cars, his attention was called to the subject, and he expected to hear the bell or whistle, but there was no bell rung or whistle blown. Plaintiff's neglect to use his own eyes was palpable negligence. The jury ought to have been instructed that he had offered no evidence of due care on his part, and was not entitled to a verdict."

In the case of *Cliff v. The Midland Railway Co.*, L. R. 5 Q. B. 258, Hilary Term, 1870, LUSH, J., uses this language: "I think that when the legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things." It was held, accordingly, where the action was negligence in knocking the plaintiff down and injuring him at a crossing of the railway, that it was error in the judge, in summing up, to leave to the jury as evidence of negligence in the railway company, the omission to keep a gate-keeper.

We think the law may be regarded as fixed, that no neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing, where these may be available; and injury where the use of either of such faculties would have given sufficient warning to

The Bellefontaine Railway Co. v. Hunter.

enable the party to avoid the danger, conclusively proves negligence, and there can be no recovery; unless the railroad company has been guilty of such conduct as will imply an intent or willingness to cause the injury; and this can only be attributed where the company has notice of the particular emergency, in time, by the use of ordinary diligence, the means being at hand, to avoid the collision.

In *The Indianapolis and Cincinnati R. R. Co. v. McClure*, 26 Ind. 370, where the action was for killing stock, a quotation is made from Redfield on Railways, an author whose language it were well always to carefully weigh, stating that this willingness to injure "is always to be attributed to the defendant, if he might have avoided injuring the plaintiff, notwithstanding his own negligence." The decision, however, was in express contradiction of this rule; for it is admitted that the company in that case were guilty of carelessness in running their train at too great speed, and yet they were held not liable. The reporter inadvertently carried into the syllabus this erroneous statement of the law, the use of which was simply incidental and not material to the decision. Such a doctrine would require the exercise of the highest degree of diligence on the part of the defendant to protect the plaintiff from the consequences of his own negligence.

In the case before us, each party had a right of passage, limited by that maxim of equity, *sic utere tuo, ut alienum non lœdas*. Upon each rested the obligation, in the exercise of this right, to use such reasonable degree of foresight, skill, capacity, and care, as would be consistent with a proper regard for the safety of all others exercising the same right and using like precautions. We do not say that such care must be used by each as would prevent the possibility of injury to himself or another. There are inevitable accidents. But such care is required as would reasonably and under all ordinary circumstances avoid collision with one using like caution — such care as a prudent man in the exercise of his usual diligence will observe. It is true that prudent men are sometimes careless. When so, they must accept the consequences of their departure from their usual line of conduct, and the exception is not to mark the amount of care exacted by the law.

Of necessity, the special acts, the omission of which would on the one part constitute carelessness, may not be required from the other party. One approaching in a carriage, on the highway, the crossing of a railroad, over which express trains at a high rate of

The Bellefontaine Railway Co. v. Hunter.

speed are frequently passing, may reasonably be required to assure himself, if he can, by the use of his organs of sight and hearing, that no cars are in dangerous proximity. If the use of such means would give the information, he may properly be charged with such knowledge. If necessary to make such observation, he will be required to reduce the rate of speed at which he is moving, or even to stop his conveyance; and where regular trains are passing, he should take notice of the time when they are due, if such information is reasonably accessible. On the other hand, the company are required to keep a reasonable look out at public crossings and give such signals of their approach as are calculated to notify the public, when without such signals, and in the proper care and caution by the public, their proximity would not otherwise be known. Thus, if the track were concealed from view, and the sound of the train from high wind or any other cause was destroyed, it would devolve upon the company to use any other usual and proper method to give notice to passengers upon the highway. But an express train, having connections to make where failure may involve the loss of many lives, cannot be required to stop, or even materially reduce its speed, at every cross road where their approach is in full view and the sound of the train apparent to persons upon the public way.

By statute in many States certain signals are required to be given by a train when nearing any public crossing, and therefore their neglect to comply with the law under such circumstances is negligence; but no such special act is now required in this State, and therefore its omission is not in itself negligence, unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper.

The fifth instruction asked by the appellant should, under the evidence before us, have been given. The objection that it did not hold the appellant liable for gross negligence is of no force, for there is no evidence of any witness from which such intent or willfulness to inflict the injury could be inferred. The sixth instruction asked should also have been given without modification. It is objected that the words "without first *fully* ascertaining that there was no danger from collision" are too broad, and that the test should be the conduct of a prudent man under the circumstances. But while negligence is, in general, a mixed issue of law and fact, yet it is equally true that when the fact which it is claimed con-

The Bellefontaine Railway Co. v. Hunter.

stitutes negligence is found, its legal character and consequences become a matter of law. *The Toledo and Wabash R. R. Co. v. Goddard*, 25 Ind. 185; *Dascomb v. Buffalo and State Line R. P. Co.*, 27 Barb. 221; *Butterfield v. The Western R. R. Co.*, 10 Allen, 532. Thus, if the deceased was apprised of the approach of the train by the noise, and ventured upon the track from a miscalculation of his danger, the error was his, and the company are not answerable for that erroneous calculation.

The seventh instruction should not have been changed by the insertion of the words "and recklessly," there being no evidence to justify such language. It is not proper that a court should countenance a jury in an evasion of the law, by bringing all cases where the injured party has been guilty of contributing negligence within the exception. The most that can be said under the evidence, in any view, is, that no signal was given, and that the railroad train was running at a great rate of speed. But in *The Indianapolis and Cincinnati R. R. Co. v. McClure*, *supra*, excessive speed was held not to justify a finding of willfulness or willingness to inflict the injury.

The twelfth instruction asked informed the jury that if Hunter's negligence contributed to his injury, and he knew or had reason to believe such fault would or might do so, he cannot recover. If the injury "resulted from the fault or negligence of both parties," Hunter could not recover; and his knowledge that such would be the result certainly could not change the rule. It would seem from the argument of counsel that they construe the instruction to import, that if Hunter did an act which he knew or had reason to believe would or might contribute to his injury, there can be no recovery.

The thirteenth instruction we are not prepared to sustain. A willingness to inflict the injury would perhaps render the company liable, although the injured party might have avoided the injury by reasonable diligence. But the court gave this instruction in the eighth one given. We do not regard either as properly applicable to the evidence. So also of the eleventh and twelfth instructions given.

The thirteenth instruction might well have been more guarded. It is not clear that the rate of speed of a train in "public view," approaching a road crossing at a distance from a city, is material in enabling a prudent man to avoid collision; for if you reduce the

McEwen v. Jeffersonville, Madison and Indianapolis Railroad Co.

speed, the train being in open view, the traveler attempting to pass before the cars may by an error of judgment be injured, unless the train be so far under the control of the engineer that he can absolutely stop it before reaching the crossing, a requirement which would forbid rapid transportation, in effect. A prudent man would permit a train in "public view" and very near, to pass before attempting to cross the iron path.

The fourteenth instruction assumed erroneously that there was proof of willingness to inflict the injury complained of.

The fifteenth instruction should have informed the jury that if Hunter by the exercise of ordinary care might have seen or heard the train approaching, he was not justified in encountering the risk of crossing before it.

Reversed, with costs; remanded for a new trial.

NOTE.—In *Hart v. The Erie Railway Co.*, 8 Albany Law Journal, 512, the Court of Appeals of New York held, directly, that a traveller on a public thoroughfare crossing a railroad, has a right, on approaching the crossing, to expect that the usual warning by bell, whistle or flagman, will be given of the approach of a train. He is not bound to assume that the railroad company will violate the law by omitting such precaution. He has a perfect right to act upon the assumption that they will obey the law, in determining the degree of caution which he should exercise in approaching the crossing.—REK.

McEWEN *et al.*, appellant, v. JEFFERSONVILLE, MADISON & INDIANAPOLIS RAILROAD COMPANY.

(33 Ind. 303.)

Common carrier — bill of lading and delivery without presentation of.

A railroad company, bound by a bill of lading to deliver goods on payment of freight "and presentation of a duplicate" bill, is responsible, if it makes delivery without such presentation. Such a clause in a bill of lading is for the benefit of the consignee.

ACTION by McEwen & Jones against the Jeffersonville, Madison & Indianapolis R. R. Co. The principal facts appear in the opinion. A demurrer to the complaint was sustained. Plaintiffs appealed.

F. T. Hord, for appellants.

S. Stansifer, T. A. Hendricks, O. B. Hord and A. W. Hendricks, for appellee.

McEwen v. Jeffersonville, Madison and Indianapolis Railroad Co.

ELLIOTT, J. The contract of shipment, which is the basis of the complaint, is contained in the bill of lading, by which the appellee acknowledged the receipt of the flour from Jones & Co., and agreed to deliver it to Comstock & Co. at the regular station at Indianapolis, on payment of freight "*and presentation of duplicate hereof.*" The latter clause, which we have italicized, was inserted in the bill of lading by the appellee's agent, at the instance of Jones & Co. The reason for which was, as alleged in the complaint, that Jones & Co. had previously contracted the flour to Comstock & Co., to be delivered on cars on the appellee's railroad, and to be paid for on the receipt of the bill of lading. Comstock & Co. had in the meantime become insolvent, and Jones & Co. did not intend that the flour should pass to their possession until it was paid for. This they intended to guard by the insertion of a clause in the bill of lading, making it a condition to the delivery of the flour that Comstock & Co. should first present to the appellee the duplicate bill of lading. Jones & Co. did not forward the duplicate to Comstock & Co., but transferred it by indorsement, with a draft drawn on the latter for the price of the flour, which they negotiated with the appellants, by whom it, with the bill of lading attached, was forwarded to Indianapolis for collection. Comstock & Co. did not pay the draft on presentation, and consequently the bill of lading was not delivered to them; and, therefore, they could not present it to the appellee; but the latter delivered the flour without its presentation.

Comstock & Co. were the consignees of the flour, and, in the absence of any condition being annexed to the delivery, would have been entitled to its possession on its arrival at Indianapolis, by paying the freight. The question, therefore, as to the sufficiency of the complaint depends upon the proper meaning and legal effect of the clause of the bill of lading, "*and presentation of duplicate hereof.*"

It is contended by the appellee's counsel that this clause in the bill of lading must be regarded as having been inserted for the benefit of the carrier, as a means of identifying the consignees; that the railroad company was responsible for the delivery of the flour to Comstock & Co., the consignees; and that in delivering it to them without the presentation of the duplicate bill of lading, the only risk incurred was that of the proper identity of the persons named as consignees. No direct authority is cited in support of

McEwen v. Jeffersonville, Madison and Indianapolis Railroad Co.

this proposition; but it is claimed that it stands upon the same footing as the other provision in the bill of lading, "upon payment of freight," and it is insisted that it is settled by the authorities that this latter provision in bills of lading is always regarded as having been inserted for the benefit of the carrier, which he may disregard in the delivery of the goods to the consignee and look to the consignor for the freight. But this proposition is too broadly stated, and not sustained by the cases cited. In *Collins & Timberlake v. The Union Transportation Co.*, 10 Watts, 384, the goods were shipped by E. & D. Gratz, commission and forwarding merchants, for Collins & Timberlake, who were merchants in Lexington, Kentucky, and the owners of the goods which were consigned to Hutchinson & Leslie, a commission and forwarding house in Pittsburgh, and to be delivered to them "upon the payment of freights." The goods were carried by the Union Transportation Company and delivered to Hutchinson & Leslie without the payment of the freight, who forwarded them to Collins & Timberlake, and they paid the freight to Hutchinson & Leslie. The latter became insolvent. The Union Transportation Co. then sued Collins & Timberlake for the freight, and it was held that they were liable. It is said in the opinion of the court, "that the stipulation in a bill of lading, for delivery on payment of freight, is introduced for the benefit of the consignor, or the party for whom the consignee is agent," and that "if the agent should be faithless, the loss should fall on those who trusted him, and they ought to bear it."

Barker v. Havens, 17 Johns. 234, is also cited. In that case the owner of the goods shipped on the plaintiff's vessel, to be carried from New York to Liverpool, to be delivered to C., the consignee, he paying freight, etc. The master delivered the goods to the consignee without receiving the freights, which the consignee subsequently refused to pay. The suit was brought against the consignor, the owner of the goods, and he was held liable for the freight. But it was said by SPENCER, C. J., who delivered the opinion of the court, that he should be clearly of opinion, "that if it appeared that the goods were not owned by the consignor, and were not shipped on his account, and for his benefit, the carrier would not be entitled to call on the consignor for freight." This, upon principle, would seem to be the proper rule in such cases. If the owner consigns the goods, for his own benefit, to his agent, and the latter refuses to pay the freight, though the carrier is not bound to deliver

McEwen v. Jeffersonville, Madison and Indianapolis Railroad Co.

the goods to him until the freight is paid, still the owner of the goods should be liable. But if the consignee is the owner of the goods, and they are shipped for his benefit, it is his duty to pay the freight, and if it is so stipulated in the bill of lading, the carrier must look to him alone for the freight.

Shepard v. De Bernales, 13 East, 565, is cited in both the foregoing cases as a leading case on this subject, and accords with the opinion expressed above.

But the stipulation that the goods were to be delivered to Comstock & Co. upon the presentation of the duplicate bill of lading, does not rest on the same foundation as that for the payment of freight. It is true that an unconditional consignment of goods to a consignee by name is *prima facie* evidence that he is the owner and entitled to the possession of them, but it is not conclusive, and in many cases the consignee is but the agent of the consignor and receives the goods for his benefit. It is the right of the shipper or consignor, in naming a consignee, to subject the delivery of the goods to him to any condition deemed proper by the consignor; and if, upon the arrival of the goods at the place of destination, the consignee does not comply with the condition, the carrier may discharge his liability as such by storing the goods in a proper warehouse, subject to the order of the shipper. In such a case the carrier is agent of the shipper, and his primary duty is "to observe the instructions of his principal; and when he disregards them, he voluntarily assumes a responsibility by which he must content himself to abide." *Johnson v. The New York Central R. R. Co.*, 33 N. Y. 610.

In this case, the stipulation in the bill of lading that the flour should be delivered to Comstock & Co. upon the presentation by them of the duplicate bill of lading, was inserted at the instance of Jones & Co. for their benefit and protection. It constituted a condition to the delivery of the flour to Comstock & Co., that they should first present the duplicate bill of lading to the appellee, and without which the latter was not authorized to deliver the flour to them. The duplicate bill of lading was delivered to Jones & Co. by the agent of the appellee; it could not be in the possession of Comstock & Co. until it was delivered or transmitted to them by or through Jones & Co.; and until it was received by them they were not authorized to receive the flour. By the contract of sale, Comstock & Co. were to pay for the flour on presentation of the duplicate

McEwen v. Jeffersonville, Madison and Indianapolis Railroad Co.

bill of lading; and as they had become insolvent, care was taken to have the bill of lading, with a draft for the price of the flour, presented to them before the arrival of the flour at Indianapolis. The draft was not paid, and the bill of lading was not, therefore, delivered to them; and if the appellee had observed the condition annexed to the delivery of the flour, the appellants, as the assignees of Jones & Co., would have been protected from loss. The loss resulted from the wrongful delivery of the flour by the appellee, without requiring the production of the duplicate bill of lading. The delivery was in violation of the instruction of the consignor, and the appellee must suffer the consequences.

But it is contended that under the contract between Jones & Co. and Comstock & Co., as stated in the complaint, the right of property in the flour vested in Comstock & Co. as soon as it was placed on the appellee's cars at Columbus, and that they were, therefore, entitled to its possession on its arrival at Indianapolis. We do not think so. Had the bill of lading stipulated for the delivery of the flour, under the contract of sale, to Comstock & Co. unconditionally, on its arrival at Indianapolis, the right of property would undoubtedly have vested in them, subject only to the right of Jones & Co. or their assigns of stoppage *in transitu*, before delivery. But as between Jones & Co., the consignor, and the carrier, it was the privilege of the former to annex a condition to the shipment and delivery of the flour to Comstock & Co. by which the former would retain the control of the possession. It is conceded that if the shipment had been made subject to the order of Jones & Co., though intended to be applied to the contract with Comstock & Co., the latter could not have claimed possession without the order of Jones & Co.; and we think that precisely the same result was effected by the stipulation that Comstock & Co. should present the duplicate bill of lading before receiving the flour, and then withholding the bill of lading from them until the flour should be paid for. See Angell on Carriers, 424, § 511. The discount of the draft by the appellants and the assignment and delivery to them of the duplicate bill of lading by Jones & Co. amounted to a sale of the flour to the appellants, in trust, to be delivered to Comstock & Co. if they paid for it on presentation of the draft and duplicate bill of lading, or in case they refused, then to sell the flour and pay the draft. *Allen v. Williams*, 12 Pick. 297; *The Bank of Rochester v. Jones*, 4 N. Y. 497.

Toledo, Wabash and Western Railroad Co. v. Hammond.

It is claimed, however, that when Comstock & Co. accepted the draft, they were entitled to the possession of the flour. By the terms of the contract, as stated in the complaint, the draft, it being accompanied by the bill of lading, was payable on presentation, and Comstock & Co. were not entitled to three days of grace; and the error of the appellants' agent in allowing that time before protesting the draft for non-payment did not entitle Comstock & Co. to receive the flour without the duplicate bill of lading. The appellants were secure in their lien on the flour so long as they withheld from Comstock & Co. the duplicate bill of lading, if the appellee had not violated the stipulation requiring the production of the duplicate before the delivery of the flour.

The third paragraph of the answer was manifestly bad. It admits, in effect, that the agent who signed the bill of lading was the appellee's station agent at Columbus, where the flour was shipped, with authority to receive and forward freights, which necessarily included the power to make and sign bills of lading and receipts for freights shipped at that point. It was the right of the shipper to name the consignee and annex such conditions as he deemed proper to the delivery to him of the goods shipped; and the fact that the agent was furnished blank bills of lading which did not specify any condition to the delivery of goods shipped, could not limit the power of the agent in that respect.

Judgment reversed, with costs, and the case remanded, with directions to the circuit court to overrule the demurrer to the complaint and sustain it to the third paragraph of the answer.

TOLEDO, WABASH & WESTERN R. R. Co., appellant, v. HAMMOND.

(28 Ind. 379.)

Common carrier—baggage—delivery.

Where baggage is carried past its destination by a railroad company, stored at the wrong station, stolen, and thereby lost to the owner, the company will be liable as common carrier.

An opera glass may be included in the articles of baggage for which a common carrier is liable.

ACTION in the case. The facts appear in the opinion.

W. Z. Stuart, for appellant.

O. Blake, for appellee.

GREGORY, J. Hammond sued the railway company as a common carrier, for a trunk and the contents thereof, shipped at Toledo, Ohio, for Peru, Indiana. There was filed with the complaint a bill of particulars of the contents of the trunk. The defendant moved to strike out certain specified items therein for the alleged reason that they were not proper articles of baggage. The court overruled the motion; and this is complained of as erroneous. It is enough to say, that there is no allegation in the complaint that the trunk and its contents were delivered to the appellant as baggage.

The court here disposes of a matter of practice.

There was a conflict in the evidence as to whether the trunk was to be carried by the appellant to Peru or to Lafayette. The appellant asked the court below to instruct the jury, that, "if the company is not liable in this case as a common carrier; that is, if the goods were not lost in transit between Toledo and Lafayette, the plaintiff cannot recover, and your verdict should be for the defendant." The court refused to give this instruction. The court had charged the jury, that "in this case the suit is against the railway company as a common carrier, and if you find that the company carried the goods safely to their destination, and, in the absence of the plaintiff, securely stored them in her depot baggage-room, then the liability of the company as a common carrier ceased, and Hammond cannot recover for the negligence of the company in keeping the baggage as warehouseman."

The jury found, as they well might under the evidence, that the trunk was, under the contract of shipment, to be delivered to the appellee at Peru. If in violation of this contract the appellant took it to Lafayette, and there stored it in her depot baggage-room, her liability of common carrier was not thereby terminated. The court was right in refusing to give the instruction asked.

At the instance of the appellee, the court instructed the jury, that, "if the plaintiff employed the defendant as a common carrier for hire to transport his baggage from the city of Toledo, Ohio, to Peru, Indiana, the defendant was bound to deliver the baggage at Peru, Indiana, and if the defendant did not do so, but carried the baggage past Peru to Lafayette, Indiana, and the baggage was

Toledo, Wabash and Western Railroad Co. v. Hammond.

stolen from the defendant at Lafayette, whereby it was lost to the plaintiff, the defendant is liable to the plaintiff for whatever damage he may have sustained by reason of the defendant's failure to deliver the baggage at Peru, Indiana."

It is claimed that this is the counterpart of the instruction refused; that if one was refused, the other ought to have been. This latter instruction goes upon the hypothesis that it turns out in evidence that the defendant was employed as a common carrier for hire to transport the baggage to Peru. This instruction was right. It does not ignore the evidence tending to prove that the trunk was shipped to Lafayette and not to Peru.

It is urged that the court erred in permitting the appellee to testify as to the value of the opera glass mentioned in the bill of particulars.

It is argued that the opera glass was not properly baggage, and therefore the common carrier, without knowledge of the fact that it was in the trunk, would not be liable for the loss thereof.

It is true, that it is well settled that merchandise which one carries in a trunk without the knowledge of the carrier, is not protected as baggage, and if lost without the express fault of the carrier, he is not liable. *Great Northern Railway Co. v. Shepherd*, 9 Eng. Law & Eq. 477; *Collins v. Boston and Maine R. R.*, 10 Cush. 506.

But baggage is defined to be "such articles of apparel, ornament etc., as are in daily use by travelers, for convenience, comfort, or recreation." 1 Bouvier's Law Dic. 180.

In *Doyle v. Kiser*, 6 Ind. 242, the learned judge, speaking for the court, says: "The articles of property treated as baggage, according to the decisions of different courts, may be clothing, traveling expense money, a few books for the amusement of reading, a watch, a lady's jewelry for dressing, etc."

It is said in Bouvier, *supra*, "From analogy to the foregoing articles, it will be obvious that the term baggage must comprehend an almost infinite number and variety of articles not enumerated here."

An opera glass is as useful to the traveler as a "few books for amusement," or more so.

That the trip from Toledo to Peru was made in the night, can make no difference. Articles for use as baggage at the end of the journey or during a temporary stay at a particular place are as properly baggage as those actually used in the transit. We think

The State v. Pottmeyer.

the court below committed no error in allowing the evidence to go to the jury.

It is insisted that the evidence does not support the verdict. It is admitted that there is a conflict in it, but it is claimed that the preponderance is so strongly in favor of the appellant that the court erred in overruling the motion for a new trial. We do not think so. Hammond, the appellee, swears positively that he shipped the trunk at Toledo for Peru. He was going there himself. Unlike the baggage-master, his attention was not divided between that and a large number of other trunks. Moreover, it would be perfectly natural that Hammond should have his mind fixed on Peru, the place of his destination; but the baggage-master would only have his mind called to the place by a single statement from the shipper. The chances are two to one that Hammond was right, and the other witnesses were wrong. But be this as it may, we cannot, under the rule of law on the subject, interfere with the finding of the jury, sanctioned as it is by the action of the court in which the case was tried.

Judgment affirmed with costs.

NOTE.—See *Dexter v. The Syracuse, Binghamton, etc., R. R. Co.*, 1 Am. Rep., 537.

In *Macrow v. The Great Western Railway Co.*, L. R., 6 Q. B., 612; 3 Albany Law Journal, 476, the Court of Queen's Bench, in a well considered opinion, said, "We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or the ultimate purpose, of the journey, must be considered as personal luggage. This would include not only all articles of apparel, whether for use or ornament, * * * but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler and the taking of which has arisen from the fact of his journeying."—RER.

THE STATE, appellant, v. POTTMEYER.

(33 Ind. 402.)

Riparian owner—ice in streams.

Under a statute making it an indictable offense to remove, without license, from the lands of another "any tree, stone, timber, or other valuable article," held, that ice formed in a stream not navigable was a part of the realty and a "valuable article."

The State v. Pottmeyer.

INDICTMENT. This case was heretofore before this court, and the indictment, charging that the appellee did then and there unlawfully cut, saw and remove from land belonging to one Daniel P. Baldwin, in the county of Cass, one hundred cubic feet of ice, of the value of ten dollars, being then and there the property of said Baldwin, without a license, etc., was held good. 30 Ind. 287. Upon the trial of the case, the proof was, that the appellee removed the ice, which was of a specified value as an article of commerce, by cutting from a pool formed by a dam in a stream not navigable, and from the portion of the pool over the land of said Baldwin, the appellee owning the land opposite to the place where the ice was removed.

The court instructed the jury as follows:

"If the ice in controversy was formed in the waters of a flowing stream running in its natural channel over, on, and across a part of the land of Baldwin, it is no part of the land, and is not fairly included in 'other valuable article' as used in section 14, page 462, 2 G. & H."

"7. The fact that the ice was cut in the backwater of a mill-dam, where the current of the stream is checked, commonly known as a mill-pond, will make no difference, if it was a flowing stream as above described."

The instructions were excepted to, and there was a finding for the appellee.

The statute under which the indictment was found declares that any person who, without a license so to do from competent authority, shall remove from the lands of another any tree, stone, timber, or other valuable article, shall be deemed guilty of a trespass.

D. P. Baldwin, D. H. Chase and D. E. Williamson, Attorney-General, for the State.

RAY, C. J. (after stating the case.) Upon the former consideration of this case, where the present question was somewhat discussed by counsel, but not decided by this court, the entire absence of direct authority to aid in its decision was observed. Since then, neither the research of counsel nor the attention of the court has been rewarded; and we must therefore look alone to analogies and the application of elementary principles. That there can be property in ice, formed upon an artificial pond, on one's own estate,

was there decided, and that it constituted under such circumstances part of the realty, resulted as a necessary conclusion, or an indictment under this section of the statute could not have been sustained. *Bates v. The State*, 31 Ind. 72.

Indeed, that water is included in the term land, is taught by the text writers. "‘Land,’ *Terra*, is the legal signification, comprehendeth any ground, soile, or earth, whatsoever; as meadows, pastures, woods, moores, waters, marishes, furses, and heath," "and lastly, the earth, hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad coelum*, as is holden, 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14. *Registrum origin*, and in other bookes." Co. Litt. 4 a. Blackstone says, "the word ‘land’ includes not only the face of the earth, but everything under it or over it." 2 Bl. Com. 18; Bouv. Law Dic.; 1 Greenl. Cruise, 46. So it was held in *Greyes’ Case*, Owen, 20, that fish in a pond passed, not to the executor, but to the heir; the court giving judgment, that he who had the water should have the fish. And they are held as part of the realty. 2 Bouv. Law Dic., title "Pond."

Washburne says, "It may be added, in general terms, that every easement or servitude in lands, being an interest therein, can be acquired only by grant, or what is deemed to be evidence of an original grant. And in this are embraced rights in one man to take away the soil, or profits of the soil of another, called *profit a prendre*, if such right be of a freehold or inheritable character. In the matter of water, the owner of the bed of a stream may grant a certain quantity of water to be taken out of it, or a certain amount of water-power measured and ascertained." But a man may grant trees growing on his land, corn on the ground, or fruit upon trees without deed. So of the timber, stone, or other materials of a house, then standing upon his estate; and the donee in such case may take it away after the donor's death. "The law regards these things as so much of the character of chattels, as not to require the formality of a deed, to pass property in them." Washb. Real Prop. b. 3, ch. 4, § 3; *Brace v. Yale*, 10 Allen, 441.

Hilliard states, that "a water-course is regarded in law as a part of the land over which it flows. Upon this principle it will pass with the latter by a deed or patent, unless expressly reserved. So the right to a water-course is a freehold interest, of which the owner

The State v. Pottmeyer.

cannot be deprived but by the lawful judgment of his peers, or due process of law." 2 Hilliard Real Prop. 203.

But while it must be admitted that water in a pool upon a man's own estate is his property and part of his real estate, it is denied that he has any property in the water of a stream which passes over his soil, but a simple *usufruct* while it passes along. 3 Kent's Com. 439, 445. This use it is admitted, however, authorizes the actual taking of a reasonable quantity of the water for domestic, agricultural, and manufacturing purposes. *Id.*

In *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, SHAW, C. J., says, "The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character, that while it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question, depending on various circumstances. * * * It is therefore, to a considerable extent, a question of degree; still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes." *Gould v. Boston Dock Co.*, 13 Gray, 442; *Brown v. Bowen*, 30 N. Y. 519; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Patten v. Marden*, 14 Wis. 473; *Tyler v. Wilkinson*, 4 Mason, 397; *Evans v. Merriweather*, 8 Scam. 492.

"The general rule, as a rule of the common law of England, was long since laid down as unquestioned by Lord Holt, who says, in the case of *Rez v. Wharton*, Holt, 499, that a river, of common right, belongs to the proprietors of the land between which it runs, to each that part nearest his land. This has been frequently, if not uniformly, adopted as the established rule." Bac. Ab. tit. Prerogative; Sir John Davies R. 155. *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544. The uses of the waters of private streams belong to the owners of the lands over which they flow. *Cooper v. Williams*, 4 Ohio, 253. "They are as much individual property as the stones scattered over the soil." *Buckingham v. Smith*, 10

Ohio, 288. This "property," however, in the water, should be limited to a reasonable use or consumption, as against the rights of other riparian proprietors.

But the entire ground upon which any property in water, as water, flowing in a stream, is denied, in distinction from the admitted property in its *impetus*, is in that, as Blackstone states, "it is a movable, wandering thing, and must of necessity continue common by the law of nature." 2 Bl. Com. 18. In *Sury v. Pigot*, Popham, 166, it is quaintly said, that an *ejectione firma* will not lie for water "because it is not *firma sed currit*." But when this "movable, wandering thing" has congealed and become attached to the soil, does it not, like any other accession thereto, become part of the realty? Wherein does it differ from alluvion, or accretion? which is but the imperceptible deposit or additions of earth, sand, gravel, and other matter made by rivers, floods or other causes, upon land. Angell on Water-courses, § 53. It is the adhering of property to something else, by which the owner of one thing becomes possessed of a right to another. Webster's Dictionary, where is cited the sentence from Richard Cobden, "The golden alluvions are there (in California and Australia) spread over a far wider space; they are found not only on the banks of rivers and in their beds, but are scattered over the surface of vast plains." This addition is alluvion, whether arising from natural or artificial causes. 2 Hilliard Real Prop., 195, note *a*; Bouv. Law Dic. It has been held, "the sea-weed thus thrown up by the sea may be considered as one of those marine increases arising by slow degrees; and according to the rule of the common law, it belongs to the owner of the soil." *Emans v. Turnbull*, 2 Johns. 313.

In *Blewett v. Tregonning*, 3 A. & E. 554 (30 E. C. L. 151), which was an action for trespass for taking away sand from the plaintiff's close, it was pleaded that the close was contiguous to the seashore; that the sand had from time to time drifted and been carried by the wind from the seashore upon the close and been there deposited. PATTESON, J., said, "I am, however, of opinion that when anything in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world."

If water in a pool upon one's land be part of the realty, because fixed and stationary, why is it not, when congealed over the bed of the stream, to the thread of which his title extends?

True, nature will in time, if it be not removed, again change the

ice to fluid, and it will pass away from possession; but not more certainly than the changing winds and the rising tide will sweep away the shifting sands.

But the supreme court of Massachusetts has discussed this subject, in a case where it was held that the owner of a mill-pond on a water-course cannot maintain a bill in equity to restrain a riparian proprietor above, from cutting ice on the same stream, until the rights of the parties have been determined at law. SHAW, C. J., says: "In a case between the owners of a mill with the privilege of a mill stream, and the riparian owner of land, on a large pond, supplying such mill stream, the nearest analogy perhaps, and that is apparently a strong one, is to that of riparian proprietors, on a running stream," which is the exact case now in judgment. He proceeds, "As between these, we think it is now well settled that the upper proprietor has a right to make any use of the stream which is beneficial to his estate and himself, which is reasonable, and does not either wholly take away the right of the lower proprietor, or does not practically and in a perceptible and substantial degree diminish and impair the equal and common right of the lower proprietor." The court then questioned the right of the mill owners to claim any participation in this right to cut ice enjoyed by the riparian proprietors. "But," the chief justice continues, "there are other considerations. It is quite doubtful, considering the complainants' claim as a claim for actual and substantial damage to their mills, whether the cutting and carrying away of the ice mentioned, or of any quantity of ice, would diminish the volume of water which would come to the complainants' mills, and of which they could avail themselves for driving their mills. Ice must be cut in winter. It usually melts in the latter part of winter or early part of spring, together with the ice and snows of the surrounding country; and these, together with the rains which cause and promote them, constitute what is usually called the spring floods, which commonly cause a great surplus of water in similar mill streams, not only not available to any useful purpose to mills, but often injurious. And it may well be doubted after any quantity of ice cut from such a pond, whether after the spring floods have subsided, and the useless surplus of water passed away, and long before the approach of any 'dry season,' the water in the pond would not be as full and copious for all mill purposes as if no ice had been cut." *Cummings v. Barrett*, 10 Cush. 186.

Adams v. Waggoner.

Here the right of the riparian proprietor to cut the ice formed over his land is conceded, provided it does not deprive some one entitled to the use of the water, to a substantial degree, of his rights to such use. In the case before us, no such limitation is involved. If Baldwin has not the right himself to cut the ice (which right it seems to us he possesses), still he has a right to prevent its severance from his land. And this right in him of removal can only be controlled by proof that such act would work a substantial injury to some right possessed by the riparian proprietor opposite, or to some proprietor below on the stream. And in neither case could it deprive him of his property in the ice, but simply control him in its disposition. Indeed, this right in the owner of the fee to remove ice from the stream, subject to a proper enjoyment of the water by others entitled to its use, was decided to exist in *Edgerton v. Huff*, 26 Ind. 35.

In *Mill River Manufacturing Co. v. Smith*, 34 Conn. 462, where the company owned an artificial mill pond, it was held, that it also owned the ice formed upon the pond, and that it was entitled to have the ice remain where it was; and an action of trespass *quare clausum fregit* was maintained against the riparian proprietors, who owned the bed of the original stream, but did not in that case own the artificial mill pond, for removing the ice. Clearly, such an action could be maintained by Baldwin, who owned not only the bed of the stream, but the ice itself; and it follows, of course, that the instructions given by the court were erroneous.

Judgment for costs against appellee.

ADAMS, appellant, v. WAGGONER.

(33 Ind. 531.)

Assault and battery—agreement to fight, effect of.

In an action for assault and battery the fact that plaintiff and defendant fought by agreement, or mutual consent, is no bar to the recovery, but may be considered in mitigation of damages.

ACTION for assault and battery by Waggoner against Adams. The facts appear in the opinion.

Adams v. Waggoner.

S. P. Oylar and *D. W. Howe*, for appellant.

G. M. Overstreet and *A. B. Hunter*, for appellee.

PETIT, C. J. The appellee sued the appellant for an assault and battery. The evidence shows that the battery was very severe — three wounds being inflicted by a knife.

The third paragraph of the answer was, that the injury happened in a fight by mutual agreement of the parties.

The fourth paragraph was the same in substance as the third, only changing the word "agreement" to "consent," and that the injury was the result of sudden heat, which arose during such fighting, and not from previous malice.

A separate demurrer was filed to each of these answers. The demurrers were sustained, and the appellant excepted. These rulings are assigned for error, but we need not notice them, as their consideration is waived in the appellant's brief. There was a trial had; verdict and judgment for the appellee; motion for a new trial overruled, and exceptions. The real question involved and presented for our consideration is raised by the giving of the third instruction asked by the appellee, and the refusal to give the first instruction asked by the appellant. The third instruction asked by the appellee, and given by the court, and excepted to by appellant, was this: "If you find, from the evidence, that plaintiff and defendant fought by agreement or by mutual consent, such agreement is no bar to the plaintiff's recovery of damages, but may be considered in mitigation of damages; but notwithstanding such agreement or consent, you should allow the plaintiff such damages as, under the circumstances, you may find he has sustained by the act of the defendant."

The first instruction asked by the appellant, refused by the court, and excepted to by appellant, was this: "If you find that the plaintiff and defendant fought with each other by mutual agreement, and that while so fighting, the defendant, in the heat of the conflict and without any willful or premeditated malice, inflicted upon the plaintiff the injuries of which he complains, then you should find for the defendant."

Is an agreement to fight and the fact that the injury complained of was inflicted in the heat of passion during such fight, without previous malice, a good defense to an action for an assault and

battery? There certainly is no agreement proved by the evidence in this case, all of which is in the record, that one was to fight with, and the other without, a knife; but we do not find it necessary to examine the evidence further than to see and say that it was sufficient to base such instructions on.

It is a settled doctrine of the law, that if one be attacked he may defend himself, using no more force than may be necessary to repel the attack; but should he go beyond this, and use more force than necessary, he becomes a trespasser himself, and his assailant, though first in the wrong, may maintain against him an action for damages. *Fisher v. Bridges*, 4 Blackf. 518; *Phillbrick v. Foster*, 4 Ind. 442; *Dole v. Erskine*, 35 N. H. 503. In the last case cited, which was an action to recover damages for an injury done in an affray, the court say, "A recovery may be had in cross actions for the same affray, by the party assailed for the assault and battery first committed on him, and by the assailant for the excess of force beyond what was necessary."

If the appellant had been entirely without fault when the appellee attacked him, but in defending himself had used an excess of force, a suit for damages could have been maintained by the appellee for the excess, although he was the first in the wrong; and can it be said or held that, as to his right to recover damages for the cutting he received, he is placed in a worse situation by an agreement to fight than he would have been upon an unprovoked assault upon an innocent man? In 2 Greenl. on Ev., § 85, it is said, "that if the injury was done in a fight, though by consent, it is an unjustifiable battery; the proof of consent being admissible only in mitigation of damages." In *Boulter v. Clark*, cited in Buller's *Nisi Prius*, p. 16, PARKER, C. B., said, "the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action; and that he was entitled to a verdict for the injury done him." In *Matthew v. Ollerton*, Comb. 218, it is held, "that if a man license another to beat him, such license is void, because it is against the peace." In *Stout v. Wren*, 1 Hawks, 420, it was held, "that a man shall not recover recompense for an injury received by his own consent, provided the act from which the injury be received be lawful; but when two fight by consent, and one is beaten, he may recover damages for the injury, because the fighting is illegal." In the case of *Bell v. Hansley*, 3 Jones N. C. 131, the court held, "that one may recover in an action for an assault and battery,"

Adams v. Waggoner.

although he agreed to fight, for such agreement to break the peace is void." The same doctrine is held in *Logan v. Austin*, 1 Stew. 476, and in *Dole v. Erskine*, 35 N. H. 503.

We have cited enough from secular or human laws to settle this question; but we will add one more authority, to show that this doctrine is not modern and secular, or human only, but that it is ancient and divine. In *Exodus*, xxi, 18, 19, it is written; "And if men strive together, and one smite another with a stone, or with his fist" (we insert, or cut him with a knife), "and he die not, but keepeth his bed; if he rise again, and walk about upon his staff, then shall he that smote him be quit; only he shall pay for the loss of his time, and shall cause him to be thoroughly healed."

We have bestowed no limited amount of consideration on the question presented, and we think the deduction and conclusion to which we have come, are fully warranted by the law and the reason thereof; which is, that an agreement, leave, or license, to do an act which in itself is unlawful, forbidden by positive law, and for the doing of which a penalty is attached and denounced, whether a felony or a misdemeanor, is no defense to an action for damages by a party who has been injured by the doing of such act, though he made the agreement, gave the license, leave and consent; but when the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching a man's wife or daughter, slander, libel; or trespass on his real estate or to his personal property, agreement, consent, or license, is a good defense.

The judgment is affirmed, with ten per cent damages and costs.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

DONLEY, appellant, v. TINDALL.

(22 Tex. 42.)

Confederate money — parol evidence.

In an action on a promissory note, it appearing that the agreement was to pay in Confederate money, though not so expressed upon the face of the instrument, *held* that no recovery could be had.

Held, also, that parol evidence was admissible to show that the real undertaking was that the note should be paid in Confederate money, though not so expressed in the instrument.

ACTION by S. P. Donley against John A. Tindall and S. E. Campbell on a promissory note. The note is as follows:

" \$5,000.

August 23, 1863.

" On or before the 25th day of December next, we or either of us, promise to pay J. M. Britain, or bearer, the sum of \$5,000, value received."

" JOHN A. TINDALL.

" S. E. CAMPBELL.

" JOHN TINDALL."

John Tindall was dead at the time of the commencement of this action, in 1865. It appeared that the note was given in consideration of a steam mill, in Texas, purchased by defendant, J. A. Tindall, from J. M. Britain, the payee.

Parol evidence was admitted at the trial to show that the note

Donley v. Tindall

was intended to be paid in Confederate money, to which plaintiff excepted. Evidence was admitted, also, to show that the note was held by Britain until after due; that it was then transferred to one Doty, who was informed at the time that it was payable in Confederate money; that one Anderson became owner of the note in 1864 under the belief that it was a specie demand, and that when said Anderson inquired of Britain in regard to the consideration of the note, the latter informed him that "there was nothing said at the time of the transaction about taking Confederate money in payment of the note;" that said Anderson transferred the note to plaintiff in payment of specie indebtedness.

Verdict for defendant. Motion for new trial by plaintiff denied. Plaintiff appealed.

S. P. Donley (in person), for appellant, cited Act of Congress, April 2, 1792; 2 U. S. Dig. pp. 294 to 307, §§ 2023, 2305, and cases there cited; *Fletcher v. Peck*, 6 Cranch, 139; *Von Hoffman v. The City of Quincy*, 4 Wall. 535-55.

M. Priest and *S. A. Wilson*, for appellee.

HAMILTON, J. In this and other cases now pending in this court in which suits were brought upon written obligations for money, without specifying either coin or currency, the defense has been interposed that the real undertaking was to pay in Confederate money, or that the consideration for which the obligation was given was for the obligations of the Confederate States, usually called Confederate money. There would be no difficulty in the expression by the court of a unanimous opinion, if the facts pleaded in the several cases appeared upon the obligations sued on. There is, however, a difference of opinion as to the admissibility of such a plea, and of parol proof to sustain it.

The rule contended for by Mr. Justice LINDSEY is, I think, too stringent, even in its application to written obligations legal in their character, and altogether untenable when the contract is illegal.

There can be no controversy as to the general principle of the admissibility of extrinsic evidence to explain written instruments. The uncertainty and ambiguity of wills have furnished a vast number of examples of the necessity of resorting to this rule for their true interpretation.

Wigram on Extr. Ev. 59, lays down this proposition, as deduced from the English cases: "Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare;" and in the preceding page says: "there seems to be no material distinction between wills and other instruments in this respect." This principle applies also in case of uncertainty as to the subject or object of a deed, as, for example, where an estate is conveyed by a particular name, there must be evidence to show what land is known by the name used.

The *general* rule that all parol agreements and negotiations touching the subject-matter of a written contract between the parties, anterior to or contemporaneous with the execution of the instrument, are to be regarded as merged in it, is admitted.

But the case under consideration furnishes, I think, by long and well-established authority, a notable exception to this general rule. There is no difficulty in understanding the reason why the general rule does not apply to subsequent agreements by parol changing or varying the terms of the written contract; they are not within the rule because they did not exist at the time the written contract was entered into, and therefore could not be included, the law regarding the written instrument as embracing the entire contract as understood at the moment of its execution. But this is only predicated of contracts legal in their character, and the rule cannot be invoked to cover, protect, enforce or give effect by judicial sanction to such contracts as may be shown by extrinsic evidence to have been entered into contrary to public policy, to public morals, or other cause which, if expressed upon their face, would stamp them with illegality.

In Cowen & Hill's Notes to Phil. Ev., part 2, note 304, it is said: "The rule confining the operation of parol evidence within the limits of strict exposition or interpretation assumes that the instrument has a legal existence and is valid." "Testimony to show it to be void, is always pertinent, no matter who are the parties or in what court the question arises." Deeds, however, cannot be avoided on all the grounds which apply to simple contracts. Hence, what might be a relevant inquiry as to the latter would not necessarily be in respect to the former. But in regard to *illegality* of

Donley v. Tindall

consideration, both will usually be found to stand upon the same footing in this particular."

It is not my purpose (because it is not necessary in this case) to discuss the correctness of the proposition with respect to deeds. There are, however, a number of respectable authorities in its support. In the case of *Dale v. Roosevelt*, 9 Cowen R. 310, a deed was avoided upon proof that the consideration was simoniacal; and in other cases where the consideration was the sale of an office, money won at play, or generally for anything either *mala in se*, *mala prohibita*, contrary to *public policy*, etc., etc.

So it was expressly held in the case of *Phelps v. Decker*, 10 Mass. 274. In that case it was broadly laid down "that by the common law deeds of conveyance or other deeds made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful in itself, or in consequence of any prohibitory statute, are void *ab initio*, and may be avoided by plea; or on the general issue *non est factum* the illegality may be given in evidence."

But this in a later case (11 Mass. R., p. 375) has been overruled, and the position assumed that a deed of conveyance could not, as such, be avoided by a party on the ground of having been made in consideration of a felony having been compounded. But the distinction is clearly drawn between bonds and contracts *sought to be enforced* and *actual conveyances* of lands or other property.

It is admitted that the former may be avoided, but the latter, it is said, "are to be treated in all cases as actual transfers, so far as the immediate parties are concerned, and governed by the same rule as the payment of money or the delivery of a chattel."

That this case lays down the correct rule I am well satisfied. The principle inflexibly observed in such cases is that courts will neither aid in the execution of an illegal executory contract nor relieve a party who has executed it. A deed is not a bond or simple contract which remains to be executed, but is a thing done, and when done contrary to the prohibitions of the law, or when it consummates an illegal contract, the law leaves the party executing it to the consequences of his illegal act. And for this very reason it is that courts will permit the defense of illegality to be made; not certainly for the purpose of aiding or benefiting the defendant, but because they will not be instruments in their execution.

In the case of *The Inhabitants of Worcester v. Eaton*, 11 Mass. 375,

just referred to, the court, after reviewing at considerable length the English authorities upon the subject, state the result in this language: "It appears, then, to be the settled law in England, and we are satisfied that it is also the law here, that where two parties agree in violating the laws of the land, the courts will not entertain the claim of either party against the other for the fruits of such an unlawful bargain. If one holds the obligation or promise of the other to pay him money, or do any other valuable act, on account of such illegal transaction, *the party defendant may expose the nature of the transaction to the court*, and the law will say, 'our forms and rules are established to protect the innocent and to vindicate the injured, not to aid offenders in the execution of their unjust projects;' and if the party who has foolishly paid his money repents his folly and brings his action to recover it back, the same law will say to him, 'you have paid the price of your wickedness, and you must not have the aid of the law to rid you of an inconvenience which is a suitable punishment of your offense.'"

The law and the courts which administer it are entirely indifferent as to which of the parties to an illegal contract is the loser — one or both, it matters nothing. If it be a suit to recover money paid, a chattel delivered, or real property conveyed by deed, upon an *illegal* consideration, the rule is the same as if the contract had been executory, and the action was to compel payment, delivery or conveyance; in either case the halls of justice are closed to such a litigant. This view of the question, it seems, is not satisfactory to some very able and very just minds, because it permits a party to plead his own wrong or infamy, as the case may be, and thereby obtain an unconscientious advantage over his adversary, from whom, perhaps, he has received some valuable consideration for the execution of the instrument, the payment of which he resists. This is undoubtedly true; but it is equally true that the law does not undertake in such cases to settle any question of conscience as between the parties. The courts are called upon to perform a higher duty than to settle questions of honor between wrong-doers; they are to protect society from the influence of contracts made in disregard of morality — the public weal from suffering detriment on account of obligations executed in violation of law; and to sustain, defend and protect the government in its full integrity against any agreement, undertaking or promise, which is founded in whole or in part upon or in consideration of anything

Donley v. Tindall.

which expressly or impliedly, or directly or indirectly, denies its full and complete authority as sovereign over this and all the other States of the Union. The parties to such a contract are presumed in law to know its character when they enter into it. If they speculate upon the chances of the failure of the government whose laws they disregard and whose authority they contemn, they must now learn at least the law cannot respect that which is illegal, and that courts will never give effect to a contract which looks, however remotely or contingently, to the destruction of the government.

This character of case is very unlike that in which a party seeks to recover back property, or to evade the payment of money, which was conveyed or promised fraudulently as to creditors. In the latter case there is no violation of law in the act itself; that is to say, the contract is not illegal as between the parties, but only as to creditors, who may take advantage of it.

The thing conveyed or promised is legally the subject of contract, and whether with or without consideration may be sold or promised, and when the question of recovering back property thus conveyed or resisting the payment of money promised is raised, the party who conveyed or promised will not be heard to plead his intention to defraud his creditors. Society has no interest in protecting him against his intended fraud upon his creditors, but the very reverse, and so the rule is that he shall not be permitted to deny his act.

The difference is that in the one case the *subject-matter of the contract is illegal*, and the contract cannot, therefore, be enforced; whereas in the other the subject-matter is *legal*, and the contract enforced as a penalty for an intended fraud upon third parties.

Now, it is admitted by those who differ with me on this question that if the character of the agreement as pleaded appeared upon the face of the instrument, there could be no question in that case of its viciousness and condemnation. I have stated the *general* rule to be that the operation of parol evidence in cases of written contracts is confined within the strict limits of exposition or interpretation, but have at the same time shown that this rule is based upon the assumption that the instrument has a *legal* existence, and is valid. This position will be found most amply sustained in the following cases: *Mann v. Eckford's Executors*, 15 Wend. 518; *Parker v. Parmalee*, 20 John. R. 134; *Vrooman v. Phelps*, 2 John. R. 177; *Paxton v. Popham*, 9 East. 408. See also the authorities to which these decisions refer.

This is also the rule laid down in 1 Story on Contracts, § 541.

These authorities in deciding that the real nature of the transaction may be shown, as it respects the parties to the contract, applies only where the contract is in some way sought to be enforced, or while it remains executory. "A party to an illegal transaction is not allowed by the allegation of his own turpitude to recover back what, in pursuance of a forbidden bargain, he has delivered to the other party, or in any way to avoid the bargain when once executed;" to such cases the maxim *in pari delicto portio est conditio defendentis et possidentis* applies.

These authorities from the ablest elementary authors, and opinions in numerous cases by courts of the highest character, are not, so far as I have seen, seriously controverted anywhere, and I must regard their exposition of the law upon the question as the true one.

Mr. Justice LINDSAY, in his opinion in this case, has made reference to the seventh section of ordinance No. 11 of the convention of 1866, which he supposes is relied on by the defendants below to authorize the plea of illegality. The section provides that "in all suits now pending, or that may be hereafter instituted, upon contracts in writing made since the 2d day of March, 1861, and prior to the 2d day of July, 1865, payable in 'dollars and cents,' parol testimony may be introduced to show that dollars in Confederate or other paper currency were intended, and the marketable value thereof at the time of maturity; and the same rule shall obtain when such currency was the consideration of a contract which is otherwise valid."

I do not know how far the defendants below relied upon this section of the ordinance to support the plea; but this I do know, that it is entirely without reference to this ordinance or any part of it that I regard the plea as good; and I agree with my learned brother that the section quoted is in its letter and purpose in conflict with the constitution and laws of the United States, but I cannot concur in his view of the particular provision of the constitution with which it conflicts, to wit: the last clause of the tenth section of the first article, which, among other things, prohibits the States from passing any "law impairing the obligation of contracts." It must be admitted that his view of the constitutional objection is consistent with the position which he maintains of the legality of the contract sued on against all extrinsic proof.

Donley v. Tindall.

It is impossible to know what is in the mind of the convention precisely; but I think it may be assumed that they intended, as far as they had the power, to authorize the fact of Confederate money as the consideration of the contract or its payment in discharge of an obligation to be pleaded, and its value to be assessed at the time of maturity, etc.; and that the effect of this should be to limit the recovery to its value in current money. Of course, if my learned brother be right, then this authority to plead the fact would be repugnant to the constitutional provision to which he has referred, provided the rule of construction for which he contends touching the validity of the instrument is itself under the protection of the constitution, so that it cannot be changed or in any manner altered. The view which I have taken of the case avoids this latter inquiry. I regard *legal* contracts, and none others, as being the subjects of protection under the constitution of the United States from State interference, and cannot conceive that an *illegal and void* contract can either be protected by the one or impaired by the other. The seventh section of the ordinance is in conflict with the constitution, because it assumes to give validity to *illegal* contracts, not because it seeks to impair those that are *valid*, and because it seeks to give value to the promises of a confederation of States entered into in hostility to the national authority and for its final overthrow, which promises were illegal and treasonable in their character, and are not susceptible of being validated by any power in the government.

The judgment is affirmed.

LINDSAY, J., delivered a dissenting opinion.

NOTE.—The following three propositions may be deduced from the decisions on the admissibility of parol evidence:

1. Parol evidence is admissible in the construction of contracts, to define the nature and qualities of the subject-matter, the situation and relations of the parties and all the surrounding circumstances, in order that the court may put themselves in the places of the parties, see how the terms of the instrument affect the subject-matter, and ascertain the signification which ought to be given to any phrase or term in the contract which is ambiguous or susceptible of more than one interpretation; and this although the result of the evidence, may be to contradict the usual meaning of terms and phrases used in the contract. See *Persch v. Dickson*, 1 Mason, 9; *Bradley v. The Washington, etc., Steam Packet Co.*, 13 Peters, 89; *Barry v. Bennett*, 7 Metc. 354; *Knight v. N. E. Worsted Co.*, 2 Cush. 271; *Bainbridge v. Wade*, 2 L. J. R. (N. S.) Q. B. 7; *Lowry v. Adams*, 22 Vt. 160; *Noyes v. Canfield*, 27 id. 79; *Gerrieh v. Towne*, 3 Gray, 82; *Sargent v. Adams*, 3 id. 73; *Blossom v. Griffin*, 13 N. Y. 569; *Hall v. Davis*, 36 N. H. 569; *Price v. Monat*, 11 C. B. (N. S.); *Griffiths v. Hardendergh*, 41 N. Y. 468.

2. Parol evidence is admissible in the construction of a mercantile contract to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by the usage of trade, a peculiar signification, not attaching to them in their ordinary use, and this, whether the phrases or terms be in themselves apparently ambiguous or not. Wigr. on Extr.

Miller v. Burch.

Ev. 57; 2 Parsons on Contract, 43, 54; *Chaurand v. Angerstein*, Peake, 43; *Cochran v. Redberg*, 3 Esp. N. P. 121; *Colt v. Com. Ins. Co.*, 7 John. 385; *Barger v. Caldwell*, 2 Dana, 129; *Smith v. Wilson*, 3 B. & Adol. 736; *Hinton v. Locke*, 5 Hill, 487; *Barton v. McKelway*, 23 N. J. 185; *Brown v. Byrne*, 77 Eng. Com. L. 702; *Myers v. Walker*, 24 Ill. 183; *Williams v. Woods*, 16 Md. 230; *Stewart v. Smith*, 26 Ill. 397; *Fitch v. Carpenter*, 43 Barb. 40; *Miller v. Stevens*, 1 Am. Rep. 129; 100 Mass.

3. The conversations and acts of the parties to a contract, at and about the time of the making of the contract, are admissible in evidence to show what sense the parties attached to any term or phrase used in the contract which is in itself susceptible of more than one interpretation, or which, viewed in the light of the evidence, explanatory of the subject-matter, the relations of the parties, and the surrounding circumstances may reasonably be susceptible of more than one interpretation. *Birch v. Depeyster*, 1 Stark. 167; *Crawford v. Jarred*, 2 Leigh. 630; *Gray v. Harper*, 1 Story, 574; *Walrath v. Thompson*, 4 Hill, 200; *Hart v. Hammell*, 13 Vt. 127; *French v. Carhart*, 1 Coma. 96; *Norton v. Woodruff*, 2 id. 153; *Almgren v. Dutilh*, 1 Seld. 28; *Barrett v. Stow*, 15 Ill. 423; *Macdonald v. Longbottom*, 26 L. J. R. (N. S.) Q. B. 233; *Mumford v. Gehling*, 7 C. B. (N. S.) 305; *Ganson v. Madigan*, 15 Wis. 144; *Blair v. Corby*, 37 Mo. 313; *Thorington v. Smith*, 8 Wall. 1; *Sloops v. Smith*, 1 Am. Rep. 35; (100 Mass.)—RER.

MILLER *et al.*, appellants, v. BURCH.

(23 Tex. 208.)

Abatement of nuisance—municipal corporation.

In an action against defendant, for pulling down and removing plaintiffs' livery stable, an ordinance of the town council ordering such removal is no defense, the nuisance not being caused by the erection itself but by the persons who resorted there.

ACTION by Miller and wife against Burch to recover damages occasioned by the tearing down and removal of plaintiffs' livery stable by defendant. The premises had been left unoccupied and had been resorted to by various persons as a "sink." The town council, thereupon, declared the stable a nuisance and ordered its sale and removal. Plaintiffs forbade the sale; but the sale took place, defendant bought the building and tore it down and removed it, regardless of notice from plaintiffs. Verdict for defendant, judgment thereon; refusal of a new trial, and appeal by plaintiffs.

Jones & Sayers, for appellant, cited 12 Pick. 184; 2 Barb. 104.

J. B. Rector, for appellee, cited 17 Tex. 489; 27 id. 68, and cases there cited.

CALDWELL, J. The question is, whether the defendant, sued as a trespasser for pulling down and removing plaintiffs' livery stable,

can shelter himself under an ordinance of the town council of Bas-trop, which ordered the sale and removal of the stable as a nuisance.

The question is well settled that a corporation can exercise no power not clearly delegated in the act of incorporation, or arising by necessary implication out of some delegated power. (Angell & Ames on Corporations, 97.) An ordinance, therefore, not warranted by the charter, is void, and can furnish no justification to persons acting under its authority. (Sedgwick on Stat. and Cons. Law, 466 and 468; *Welch v. Stowell*, 2 Doug. Mich. R. 323.)

The term "nuisance" is well understood, and means, literally, annoyance—anything that worketh hurt, inconvenience, or damage. (Blackstone, 3 Comm. 216; *Burditt v. Swenson*, 17 Tex. 489.) They arise from pursuing *particular trades* in populous neighborhoods; from acts of public indecency, keeping a disorderly house, a house of ill-fame, a gaming house, a livery stable, and the like. (3 Bouv. 248.)

The buildings in which the particular trades are carried on, or the houses which may be kept in a disorderly manner, or used for unlawful purposes, are not *per se* nuisances; but it is the *abuse* of them only which constitutes the nuisance. *Burditt v. Swenson*, 17 Tex. 489; *Dargan v. Waddell*, Iredell and An. R. 244; *Welch v. Stowell*, 2 Doug. Mich. R. 323. The *property* in these tenements is protected by the constitution from such a summary process, and cannot be taken or demolished for public uses, except on the award of competent authority and compensation therefor. Sedg. on Stat. and Cons. Law, 464.

If the common council may make such an ordinance in respect to the comparatively valueless stable of the plaintiff, why not a like one be executed on the most elegant and costly edifice in the town, provided it should be used for some vicious or profligate purpose, and that, too, without the knowledge or consent of the owner?

In the case before us the nuisance was not caused by the erection itself, but by the persons who resorted there, and the municipal authorities are armed with sufficient power to suppress the nuisance without resorting to the demolition of the building.

We are of opinion, therefore, that the court erred in charging that if the jury "believe from the evidence that the board of mayor and aldermen, by ordinance and resolution, condemned the said stable as a nuisance, and that in pursuance of this authority to abate the same the stable was sold to the defendant, in which

Haddock v. Crocheron.

event you will find for the defendant," for which error the judgment is reversed and new trial awarded.

Reversed and remanded.

HADDOCK *et al.*, appellants, v. CROCHERON.

(28 Tex. 276.)

Partnership — note given by one partner after dissolution.

A promissory note given after the dissolution of a partnership, by one partner, without the authority of the other, does not bind such other, although given in the partnership name and for a partnership debt.

ACTION by Haddock, Reed & Co., against Crocheron, as member of the former firm of Dimon & Crocheron, on two promissory notes, dated February 24, 1860, and signed "Dimon & Crocheron, in liquidation." The answer set up that the notes were made by Dimon, after the dissolution of the partnership, without defendant's authority. The amended petition then set forth a note of the firm of Dimon & Crocheron, made in 1857, before the dissolution, and for a balance due on which the note in suit was alleged to be given. To this the defendant pleaded the statute of limitations. At the trial the book-keeper of plaintiff was called to prove the state of accounts between them and Dimon & Crocheron, but his evidence was excluded. Plaintiff excepted. Judgment for defendant; new trial refused, and appeal by plaintiffs.

Hancock & West, for appellants, cited 7 Mass. 123; 13 Wend. 505; 3 N. H. 348; 3 East. 104; 1 Chitty, Pl., p. 105.

A. D. McGuinnis, for appellee.

LINDSAY, J. There is really but a single question presented for our consideration by this record, and that is, can one partner, after a dissolution of the partnership, by a *novation general*, or by a new engagement with his creditor, in consideration of being discharged and released from a liability, contracted during the existence of the firm, bind the retired partner by such new engagement or new obligation? This is not now an open question in this State. In *Speaks*

Ritchie v. Sweet.

v. *White*, 14 Tex. R. 368, it was decided that "the acknowledgment of an antecedent indebtedness by one partner, after dissolution, did not bind the firm." In *White v. Tudor*, 24 Tex. R. 641, it is even held that a general authority to one partner, after dissolution, to settle the business of the firm, does not warrant him to "give a note in the name of the firm for a firm debt, or to renew one given before the dissolution." This general conclusion, and these authoritative decisions, upon the vital point in this case, supersede the necessity of investigating the propriety of the exclusion of the testimony in relation to the entries in the books of the creditor. For the proof, if it had been admitted, would only have conduced to prove that the partner had executed new notes, after dissolution, for an existing obligation of the firm, which would not be binding upon the retired partner, according to the decisions of this court. Nor does the fact of the want of knowledge of the dissolution in the creditor, up to the time of the giving of the new obligation, alter the force and effect of this new arrangement, since the knowledge was necessarily brought home to him, at the time of the arrangement, by the contracting partner's signing the firm name "in liquidation." The judgment of the District Court is, therefore, affirmed.

Judgment affirmed.

RITCHIE, appellant, v. SWEET *et al.*

(28 Tex. 333.)

Promissory note — payment in Confederate money — executed illegal contract.

In an action by the payee of a promissory note against the maker, it appeared that the note was made in 1859, and that in 1862 the plaintiff voluntarily surrendered the note to the defendant, and received the amount called for in Confederate money. *Held*, that plaintiff could not recover, although the money received in payment was illegal and worthless.

ACTION by Ritchie, payee, against Sweet *et al.*, makers of a promissory note, made November 14, 1859, for \$6,500. The defense was that the note had been paid. It seems that in 1862, the plaintiff received the amount called for in the note in Confederate money, and surrendered it to defendants. Ritchie died *pendente lite*, and his widow, Fanny Ritchie, as administratrix, was substituted.

Plaintiff claimed that the surrender of the note was made under duress, and evidence was allowed to go to the jury on this point. The jury found no duress and judgment was rendered for defendants.

Plaintiff appealed.

G. W. Paschal & Son, for appellant, cited *Griswold v. Wadrington*, 16 John. 439; *Peltz v. Long*, 40 Miss. 536, and other cases.

H. P. Brewster, for appellees.

MORRILL, C. J. Suit by the payee of a note against the maker. Answer of the defendant that he owes nothing. Amended petition states that in 1862 the plaintiff surrendered the note to defendant, and received the amount called for in Confederate money—that this was no payment, because: First, it was received through duress; second, it was a worthless, spurious, void, illegal, unconstitutional, treasonable and rebellious currency.

The judge charged the jury: First, that a voluntary reception of the Confederate money, in full payment of the note by the payee, would be good payment. Second, that if the plaintiff received the Confederate note through duress, it was no payment; duress was defined to be a fear of the military authorities, alleged in the petition as the duress.

The jury found for the defendant upon the second charge given.

Plaintiff appeals, and as there is no pretense but that the jury were fully authorized to find for the defendant upon the testimony, the legality of the first charge is regarded by the plaintiff as erroneous.

That Confederate money was, in the language of plaintiff, illegal, unconstitutional, treasonable and rebellious, may be assumed as correct. It has been repeatedly decided by this court that an executory contract, the performance of which, or the consideration of which, was Confederate money, would not be considered legal, and whenever any party has called upon this court for the enforcement of a contract, which, upon its face or by testimony, is made to appear was based upon Confederate money as a consideration, or to be executed and fulfilled by the payment of it, he has universally received no favor, and has been taxed with all the costs of court. As the courts of other States have agreed with the decia-

ions of this court herein, we have no doubt of the correctness of our opinions, and see no cause to alter our decisions herein. The reason why the court will not enforce an illegal contract is, that they will not be the handmaids to what is subversive of law—that courts are courts of law, and not courts of or for illegality. And, for this very reason, courts will not lend their aid to rescind an illegal executed contract.

It is admitted that the executory contract made by the parties was legal, but it is insisted by one party that because this legal executory contract was abolished, and an illegal executed contract was substituted therefor, that both parties were guilty of an illegal act, and, therefore, the courts should lend their aid to rescue him from his own illegal acts, voluntarily made. This is virtually calling upon the court to make a contract for the parties different from the one they made themselves. When the maker of the note, in consideration of six thousand dollars received from the payee, promised to repay this sum at a specified time, with twelve per cent per annum interest, a contract was made, executed by the payee and executory on the part of the maker of the note. It was in the power of the payee of the note to insist upon the execution of this contract, and the courts would lend their aid in enforcing its performance. But it was also in the power of the parties to abandon that contract, by the substitution of a new executory or executed contract in lieu thereof; and if this was done voluntarily, freely, without compulsion, fraud, or any of those incidents or other attendant circumstances that authorize a court to interpose its power, the parties are estopped by their own acts. In the case before the court, Ritchie was authorized to receive the money called for by the note, and it was in his power to make a gift of the note either to the maker or any other person, or exchange it with either the maker or any other person for any other commodity that might be agreed on by the parties. The allegation in the petition that "the payment of the note in Confederate treasury notes was with spurious, void, illegal, unconstitutional, treasonable and rebellious currency, and, therefore, such pretended judgment was worthless, fraudulent and void; and now petitioner brings back and tenders to the defendants the full amount of such treasury notes, and interest thereon, and brings them into court and prays that said note be delivered back to her," etc., is simply stating that plaintiff did not act with either patriotism, wisdom, or in compli-

ance with the law, and calls upon the court to relieve the plaintiff of his own rebellious, foolish and illegal acts, voluntarily made. The counsel for the appellant and plaintiff makes a very excellent argument to substantiate the decision made by this court in *Smith v. Smith*, *Linder v. Barbee*, *McGehee v. Goodman*, and *Donley v. Tindall* all based upon the maxim *ex dolo malo non oritur actio*, but he does not seem to realize that, in complying with his request, we should virtually overrule those decisions. Plaintiff admits that if "the whole transaction rested upon the voluntary exchange of gold for Confederate notes, both parties being *particeps criminis*, Ritchie could not recover back his gold."

The learned counsel states the whole case in a nutshell. The note of Sweet, which Ritchie held, called for six thousand dollars in gold, and stood in the place of so much gold — by the aid of the courts was convertible into gold. This note, or what it represented, was voluntarily exchanged by Ritchie for Confederate notes. The transaction was complete in itself. It was an executed contract, and needed no confirmation, and admitting that the contract was liable to the epithets applied to it by the counsel, it was the voluntary contract of the parties, and *ex dolo malo non oritur actio*.

The plaintiff's argument assumes that the transaction between the parties, whereby Ritchie received the Confederate currency in exchange of the note, was illegal, and therefore a nullity, and the parties to be regarded in their attitude of debtor and creditor, as if this transaction had never existed. Upon this he bases his argument. As we have endeavored to show, such is not the position that the plaintiff has assumed, unless he was acting under duress. This brings us to the second charge of the court, and was in fact the only question that could arise by the pleadings. The testimony was subjected to the jury, whose special province it was to say whether Ritchie was acting freely or by duress or fear. Their verdict negatived duress or fear, and leaves the parties entirely free to make the contract. They made the contract and simultaneously executed it. If, as the plaintiff alleges, it was "illegal, rebellious, unconstitutional and treasonable," he must be governed by the law maxim *nemo allegans suum turpetudinem audiendus*.

The judgment is affirmed.

Affirmed.

Killough v. Alford.

KILLOUGH v. ALFORD, appellant.

(22 Tex. 457.)

Promissory note—legal tender notes.

A promissory note payable in "gold coin or the equivalent thereof in United States legal tender notes," is completely discharged by a payment in legal tender notes, dollar for dollar.

ACTION by J. G. Killough, guardian, against Alford, administrator, etc., on a promissory note. The facts are stated in the opinion.

—, —, —, for appellant.

W. R. Jarmon, for appellee.

WALKER, J. The defendant in the appeal, as the guardian of Susan Hunley, on the 20th of April, 1868, filed his petition in the county court of Fayette county, praying for an order to sell land situated in Wharton county, and which land had been deeded in trust to N. W. Frayson by Samuel J. Potter and his wife, L. A. Potter, whilst living, to secure the payment of a certain promissory note, which reads as follows:

"\$750.00.

"LA GRANGE, TEXAS, March 8, 1867.

"Twelve months after date we promise to pay J. G. Killough, guardian of the estate of Susan G. Hunley, or order, the sum of seven hundred and fifty dollars, with twelve per cent interest from this date, payable in gold coin, or the equivalent thereof in United States legal tender notes.

(Signed)

"SAMUEL J. POTTER.

"L. A. POTTER."

Potter and wife both being dead, their administrator is made defendant. The note and deed of trust were presented to the administrator, regularly probated, and by him accepted for payment. The county court afterward ordered the land described in the trust deed sold "for cash." This order was appealed from by Potter's administrator, and the cause taken to the district court; and at the fall term of that court for the year 1868, the decree of the county court was affirmed, and from this decree Alford, Potter's administrator, again appealed.

It is now insisted by the counsel for the appellee, that this is a

delay case; that damages should be given for the delay. And we should probably so regard the case and order accordingly, but counsel themselves insist that the decree of the court below should be reformed, and upon the authority of *Bronson v. Rodes*, 7 Wallace, 229, we should, upon the terms and tenor of the original note, order the land sold for gold coin or its equivalent in United States legal tender notes. This court, notwithstanding the most respectable and high authority of the case referred to, is not prepared to overrule its own decisions. See *Shaw v. Trunsler*, 30 Tex. 390. But it is not necessary for us to combat the authority of *Bronson v. Rodes*. We shall rather count upon some of its doctrine to sustain our own opinion in this case.

The chief justice decides the case, and the points decided are, that "a bond given in December, 1851, for the payment of a certain sum in gold and silver coin, lawful money of the United States, with interest also in coin at a rate specified until repayment, cannot be discharged by a tender of United States notes, issued under the loan and currency acts of 1862 and 1863, and by them declared to be lawful money and a legal tender for the payment of debts.

2. "When obligations made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars." The decision in this case is arrived at by knowing from the hypothesis that we have two distinct kinds of money authorized by law to be treated as legal tender; that the laws of Congress making gold and silver coin a legal tender were not repealed by the loan and currency acts of 1862 and 1863; and that we therefore must recognize the very anomalous fact that by law we have both coin and paper legal tender. And now, by the authority of this case, what are the legal tenders? Gold and silver coin and legal tender notes.

The note given by Potter and wife, which becomes the subject matter of litigation here, is, by its own terms, to be paid in gold coin, or "its equivalent in legal tender notes." Now gold is legal tender, and so are these notes. Things which are equal to the same are equal to each other. The parties may have meant, we admit, that if gold coin was not paid in satisfaction of this debt, then legal tender notes to an amount equal in commercial value to so many gold dollars and cents should be paid; but any other money might have been made to answer in payment, if this had been the intention of the parties.

We seek to place the true legal construction upon this contract,

Shreck v. Shreck.

and we therefore hold that for the payment of this note, legal tender notes of the United States are the equivalent to gold coin, dollar for dollar; and the debt may be so discharged by this payment.

But in this case we cannot see how we can do more than affirm the judgment of the court below, and it is accordingly done.

Affirmed.

SHRECK, appellant, v. SHRECK.

(22 Tex. 573.)

Marriage and divorce — conflict of laws.

A resident of Mexico married a wife in Texas, and took her to his home. She resided with him for two years, when she came to Texas and instituted proceedings for divorce against him for cruel treatment. He appeared and defended. *Held*, that the divorce might be granted, although similar causes might not be ground for divorce in Mexico.

ACTION for divorce brought by Adela Shreck against F. Schreck. The facts are sufficiently stated in the opinion.

Ballinger, Jack & Mott, for appellant.

A. H. Willie, for appellee.

LINDSAY, J. This was a suit for divorce, brought by the wife against the husband for such alleged excesses, cruel treatment, and outrages, all combined, as to render the continuance of the matrimonial relation insupportable. The parties were married in the city of Brownsville, in the State of Texas, and immediately established their domicile in the city of Matamoras, in the republic of Mexico. Because of the imputed wrongs and injuries, the wife returned to the house of her parents in Brownsville, and there instituted her suit. The divorce was decreed by the district court of Cameron county, the jury finding, under the charge of the judge, all the material allegations in the plaintiff's petition to be true.

Three grounds are mainly relied upon by the appellant to show the invalidity of the decree, and for which its reversal is asked. 1. The want of jurisdiction in the court pronouncing it. 2. The

insufficiency of the evidence to establish the existence of the statutory causes relied upon to warrant it. 3. The improper charge of the court, which, it is supposed, might have misled the jury, and superinduced a false finding.

1. It is certainly a general principle, that, in judicial action upon contracts, the law of the place where the contract was made governs in determining its construction, obligation and enforcement, its validity or invalidity, unless it be in express conflict with the law of the forum; or unless it was entered into to be performed in another country. This principle is a general one, though not of universal application. The contract of marriage being *sui generis*, may be regarded as an exception to the universality of the rule; as also such contracts as are against the interests of morality and religion, which each independent municipal authority must judge of and determine according to its convictions of what will best promote its own social happiness and welfare. In this case the marriage contract was entered into in the State of Texas, but with a view to the fulfillment of its obligations and the discharge of its duties in the republic of Mexico, the domicile of the husband. The principle is equally well recognized that the domicile of the husband is the domicile of the wife, and the same causes for divorce may not exist in Mexico as do exist in Texas.

In our peculiar system of an intercommunion of States, the doctrine seems to be well established that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to decree a divorce for any cause allowed by the local law, irrespective of the law of the place of the marriage, or of the place of the violation of the obligations of that civil relation. But there is no such intercommunion between the States of Mexico and Texas. And even in the American States it is said by Justice STORY in his Conflict of Laws, that "what would be the effect of a marriage in Connecticut, a subsequent *bona fide* change of domicile to New York, and then a divorce in Connecticut, both parties appearing in the suit, remains as yet undecided." Nor has this court been able to find a case, determined in any American court, since this annunciation by the learned commentator. It is the precise point presented for determination by this record, with the simple variance in the relations of Mexico and Texas, and of the several American States among themselves. In all Christian Protestant countries, however, a marriage contract, according to the laws of one State, is held valid in

Shreck v. Shreck.

every other. But the right, the duty, and the obligation of every State to guard and protect the interest of its own morality and religion, will warrant it, upon the principles of natural justice, while acknowledging the validity of the contract formed in other jurisdictions, to relieve its own citizens from its obligation, when the causes prescribed by its authority to work its dissolution are made manifest in its own tribunals. The wife was a citizen of Texas at the time of her marriage. The contract was made in Texas. When aggrieved beyond the measure of civil endurance, she sought an asylum in the government under which she was born, changed her domicile, and renewed her suspended allegiance, that she might find protection against injury and wrong. Unless there was some development that this was done collusively, and in fraud of the law; if the causes charged did actually exist, the relief and protection ought to have been extended, and the jurisdiction of the court attached to the cause, and was acquired by the appearance of the husband in defense.

2. The court does not deem it necessary to enter into any special commentary upon the evidence adduced to show the existence of the statutory causes for the divorce. It is enough to say if the excesses, cruel treatment and outrages affected the wife, directly and personally, in mind or body, they fall within the scope and purpose of the statute, and are such causes as were intended to be relieved against by granting a divorce. As long as the husband is kind and gentle, generous, tender and affectionate towards his wife, whatever he may be to others, and however ignominious and degraded he may be in the estimation of others, it is the policy of the law and the true interest of society that no toleration should be given to the dissolution of the connection. He may be a corsair, a brigand, the vilest of the vile, yet if he treats the wife of his bosom with gentleness, with kindness, with affection, he is "not guilty of the excesses, the cruel treatment, or outrages" contemplated by the statute. This excess, cruel treatment and outrage must affect the wife directly and personally, and not mediately or remotely. Unless she is so affected, in body or in spirit, duty enjoins forbearance and submission, and the fostering of the sentiment expressed in the distich of the poet:

"I know not, I ask not, if guilt's in that heart,
I but know that I love thee, whatever thou art."

The mutual cultivation and encouragement of this sentiment by

Spencer v. Brower.

both parties, when the marriage relation is once established, would effectually obviate all domestic broils, and dispense with the designation of any causes for divorce by the lawgiver. But, as this arcadian devotion seems unattainable in the general depravity of the age, the whips and scourges of the law must be applied to the unruly passions of mankind, in order to shield and protect the weak and the innocent from the brutality of the wicked and depraved. The view of the law taken by this court in the case of *Shannan v. Shannan*, 18 Tex., is in harmony with the opinion here expressed.

(The remainder of the opinion disposes of a question of practice.)

The judgment of the court is affirmed.

Judgment affirmed.

SPENCER, appellant, v. BROWER.

(33 Tex. 663.)

Contract — interest on debts in time of war — civil war.

Interest continues to run in time of civil war on debts due from a citizen of one belligerent, to a citizen of the other.

ACTION on two promissory notes brought by J. H. Brower & Co. against Joel Spencer. The notes were dated January 4, 1860, and were payable in New York State, March 1, 1862, and 1863, respectively, with interest. The defense pleaded no liability for interest during the civil war. Judgment for plaintiff for whole amount and interest. Defendant appealed.

T. N. Waud, and *Munson & Garnett*, for plaintiff in error, cited *Brewer v. Hastie*, 3 Call. 22; *De Saussures* Eq. Reps. 537; *Dickson v. Legare*, id. 427; *Higginson v. Air*, 2 U. S. Eq. Dig. 105; *Conn. v. Penn*, Peta. C. C. Rep. 496; *Chase v. Manhardt*, Bld. Ch. R. 333; 2 U. S. Dig. 105.

Lathrop & McCormick, for the defendants in error.

LINDSAY, J. Upon two notes for the sum of one thousand dollars each, payable in the State of New York, suit was brought by the defendants in error against the plaintiff in error, to which a plea was interposed to defeat the recovery of the accrued interest,

Spencer v. Brower.

because of the prevalence of a state of war between the citizens of the State of Texas and the citizens of the United States, which put it out of the power of the obligor to make payment. A demurrer to the plea was sustained by the court below, and rightfully. The defense has no merit as a matter of law, nor can it find any foundation in equity. In a time of war, in which parties to contracts are in hostility to each other, the judicial enforcement of contracts is in abeyance, but their obligation does not cease; and, with the restoration of peace, the remedy revives, and is restored to all its pristine vigor with it. This seems to be too obvious to require the citation of any authority in its support. The point, however, was learnedly elaborated and determined by the distinguished Chief Justice Chase, in the circuit court of the United States, at Raleigh, North Carolina, and may now be considered as, in effect, definitely settled. The judgment of the district court is affirmed.

Judgment affirmed.

NOTE.—See *Bepler v. Waller*, 3 Am. L. T. Rep. 157, wherein it was held, that during a state of civil war, interest does not accrue on money due on a contract between citizens of the belligerent parties. See, also, *Ward v. Smith*, 7 Wall. 447; *Leah v. Lambert*, 3 Am. Rep. 142.—**REP.**

CASES
IN THE
SUPREME COURT
OF
VERMONT.

COOLIDGE, appellant, v. HAGER.

(48 Vt. 2.)

Grantor and grantee—water privilege—deed.

The conveyance of a house and land by an ordinary warranty deed carries with it, by implication, the right which the grantor has to water running to the premises conveyed by an aqueduct from a distant spring; and a contemporaneous special deed, to the grantee, of the water privilege, containing limitations and restrictions in the use thereof without the words "to his heirs, assigns, etc.," will not be construed to modify the estate in the water and aqueduct so as to prevent it passing by deed of the premises from such grantee to succeeding grantees, and the latter may recover damages from the original grantor for cutting off the aqueduct on adjacent land, owned by him, and thus disturbing the water privilege.

ACTION on the case by Coolidge against Hager to recover damages for disturbing an aqueduct leading to plaintiff's premises from a distant spring. It appeared that the premises and the water privilege were formerly owned by defendant; and that he and his wife, by warranty deed in the usual form, which made no allusion to the spring or the aqueduct, conveyed the premises, consisting of a house and lot, to Mary L. Johnson. By a deed of the same date, defendant specially conveyed the water privilege to Mary L. Johnson, specifying the manner in which it should be used, and containing various restrictions and limitations, which it is unnecessary to

Coolidge v. Hager.

set forth here, but without the words "to her heirs, assigns," etc. Subsequently, Mrs. Johnson and her husband conveyed the premises to Mary A. Burbank, who in turn conveyed to plaintiff. Evidence was admitted to show that defendant, while the negotiations between Burbank and plaintiff were pending, told the latter that if he purchased the premises he would not buy the water thereby, for that Mrs. Johnson had the right to it. The opinion states the rest of the case. *Pro forma* rule that plaintiff should not recover. Plaintiff excepted.

Norman Paul and *William H. Walker*, for appellant, cited 2 Wash. on Real Property, 622, 623, 624, 626; 4 Kent's Com. 567; Shepard's Touchstone, 90; *Vermont Central R. R. Co. v. Estate of Hills*, 23 Vt., 681; *Woodbury v. Short*, 17 Vt., 387; *United States v. Appleton*, 1 Sumner, 492; *Story v. Odin*, 12 Mass., 157; *Kent v. Waite*, 10 Pick., 138; *Whitney v. Olney et al.*, 3 Mason, 280; *Hazard v. Robinson*, 3 Id., 272; *New Ipswich Factory v. Batchelder*, 3 N. H., 190; *Coheco Manufacturing Co. v. Whittier*, 10 N. H., 305; *Dunklee v. Wilton R. R. Co.*, 24 N. H., 489; Washburn on Easements, 313; *Nicholas v. Chamberlain*, 1 Cro. Jac., 121; *Lampman v. Miles*, 21 N. Y., 505.

Charles P. Marsh, for appellee, cited Am. L. Review, Oct. No., 1869, p. 40; *Johnson v. Jordan*, 2 Met., 234; *Carbrey v. Willis*, 7 Allen, 364; *Manning v. Smith*, 6 Conn., 289; *Smith, admr., v. Polard*, 19 Vt. 272; *Swazey v. Brooks*, 34 Vt. 451.

WHEELER, J. There is no such absolute discrepancy between the statement in the case that the water was brought to the house before the defendant conveyed it to Mrs. Johnson and the concession by the plaintiff's counsel, made a part of the case, that Mrs. Johnson put in the pipe and set the water to running, but that both may be true, for the water may have been running at the time she bought and she afterward have put in other pipe and set it to running again; from the whole it is understood and considered that the water was running through the aqueduct to the house at the time she bought it and at the time it was conveyed to her. Part of the aqueduct was in land conveyed with the house, part in land of the defendant adjoining that conveyed, and the rest in the land of Spaulding where the spring was situated.

The exact right or estate of the defendant to or in the spring

does not appear in the case, except as it is described in his deed to Mrs. Johnson; in that deed it is described as being an interest in the spring, and not as a mere right to the water; the defendant cannot well complain if his estate is taken to be as great as he himself described it to be in that deed. That interest was an inheritable and permanent estate in the water and land. *Mixer v. Reed*, 25 Vt. 254.

No question has or could well have been made but that all that part of the aqueduct which was in the land conveyed by the defendant and wife to Mrs. Johnson was conveyed with the land. That part of the aqueduct could have been of no material use to her, or to the house and land she had bought, without the water running in it and the right to the water in the spring and to have it run in the rest of the aqueduct as it was then running. Whoever grants a thing is supposed also, tacitly, to grant that without which the grant itself would be of no effect. 2 Wash. Real Prop., 622, Broom's Max. 362. Branch's Max. 32. Upon the principle of this maxim the grant to Mrs. Johnson of the house and land, and that part of the aqueduct in the land, carried with them the running water and the right to have it continue to run as it was then running, because the defendant could grant all these, and without them the rest of the grant could not have been enjoyed in all its material parts. Since *Nicholas v. Chamberlain*, Cro. Jarw. 121, this maxim has in almost all cases that have arisen been applied to grants of land, with water running to buildings upon it, wherever the grantor had a permanent estate that he could convey in the water and the aqueduct in which it was running, such as the defendant had in this aqueduct and this water. *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *Vermont Central R. R. Co. v. Hills*, 23 Vt. 681. The only case cited in argument, that is directly opposed to this application of the principle of the maxim quoted, is *Manning v. Smith*, 6 Conn. 289, and the authority of that case is seriously questioned in *Vermont Central R. R. Co. v. Hills*. *Swazey v. Brooks*, 34 Vt. 451, is relied upon by the defendant as an authority opposed to *Nicholas v. Chamberlain* and the cases that have followed it; but in *Swazey v. Brooks* the grantor had not the right to convey the easement which the grantee claimed that he had undertaken to convey and had covenanted that he had a right to convey; and it was held that the grant should not be construed to include that as appurte-

Coolidge v. Hager.

nant to the thing granted which was not legally an appurtenance, and which the grantor could not legally grant. With this distinction kept in view, this case is not opposed to the others. Upon principle and authority therefore it is considered that the deed from the defendant and wife to Mrs. Johnson, standing alone, would have conveyed the water as it was then running, with a right to the spring and aqueduct sufficient for its continuance, as an appurtenance to the house and land.

The other deed appears to have been executed and delivered on the same day with this one, and nothing appearing to the contrary, they are taken to have been contemporaneous and are to be construed together. The deed from the defendant alone is an express grant with certain limitations and restrictions of the same water and aqueduct of which the deed from the defendant and wife were an implied grant. By accepting the deed from the defendant with the limitations and restrictions in it, the grantee impliedly covenanted with him to take the water only in accordance with these limitations and restrictions; and the effect of this implied covenant, when construed with the other deed, was to define and limit the general grant of the water and aqueduct as included in the other deed to that extent. It did not cut down the estate granted in the water and aqueduct otherwise than to limit the extent and manner of its enjoyment.

The estate which Mrs. Johnson took, subject to the limitations and restrictions with which she took it, passed by the succeeding grants to the plaintiff. The notice found by the jury to have been given by the defendant to the plaintiff could not defeat the operation of the grants. The defendant was neither selling or conveying, nor was any one selling or conveying, what he owned; under these circumstances anything that he said or omitted to say could not affect the contracts or conveyances. Whether the defendant had any claim for any part of the expense of repairing the aqueduct that he could enforce in any way against the plaintiff is not now decided; but whatever claim he may have had that he could otherwise enforce, he had no right to cut off the pipe and disturb the plaintiff in the enjoyment of his right as a penalty for non-payment.

The result is that the plaintiff had a right to the water running in the aqueduct, which the defendant disturbed without right, and for this disturbance the plaintiff is entitled to recover.

The *pro forma* judgment of the county court is reversed and judgment is rendered in this court for the plaintiff for the damages found by the jury, with interest.

ATKINS, appellant, v. JOHNSON.

(48 Vt. 78.)

Libel — agreement between wrong-doers.

A contract by which the author of a libel agrees to indemnify the publisher thereof is void.

ACTION in assumpsit. The case comes into this court upon a general demurrer to the plaintiff's declaration.

The declaration alleges that "on the 22d day of July, 1867, the defendant, by his agreement in writing of that date, undertook, and promised the plaintiff, that, in consideration that the plaintiff would print and publish an article in the *Argus & Patriot*, a weekly newspaper published in Montpelier by the plaintiff, entitled "A Jack at all Trades Exposed," that said article was all true, that there was enough to back it up, etc., and that he, the said defendant, would defend and save harmless the plaintiff from all damage and harm that might accrue to the plaintiff in consequence of publishing said article; that said article, if untrue, was a libel upon the character of one John Gregory; that relying upon the said promises of the defendant he published the article; that after said publication, the said Gregory called upon the plaintiff for the name of the writer of the article; that thereupon the defendant requested the plaintiff not to give the said Gregory the name of the writer, and, in consideration thereof, promised the plaintiff that he would save him from all harm; that if said Gregory sued the plaintiff, that he, the defendant, would defend the suit, prove the charges, and save the plaintiff from all trouble and expense in the premises. The plaintiff, relying thereon, withheld the name of the defendant as the author of said article; that the said Gregory sued the plaintiff; that the defendant failed to defend the said suit, and the said Gregory recovered a judgment against the plaintiff, which he has been compelled to pay, and the defendant refuses to indemnify him.

Atkins v. Johnson.

The court pronounced the declaration insufficient, and rendered judgment for the defendant. Exceptions by plaintiff.

C. J. Gleason, for appellant, cited *Fletcher v. Harcut*, Hutton Rep. 55; *Chitty on Contracts*, 503, 504; *Betts et al. v. Gibbins*, 29 Eng. Com. Law, 29; *Adamson v. Jarvis*, 13 Id. 34; *Woolsey v. Batte*, 12 Id. 198; *Stone v. Hooker*, 9 Cowen, 154; *Ives v. Jones*, 3 Iredell, 538; *Avery v. Halsey*, 14 Pick. 174; *Kneeland v. Rogers*, 2 Hall, 579; *Hackett v. Tilly*, 11 Mod. 93; *Smith et al. v. Barston*, 2 Doug. Mich. 155; *Armstrong v. Toler*, 6 Curtis U. S. 587; *Hall v. Huntoon*, 17 Vt. 244; *Given v. Driggs*, 1 Caines, 450; *Doty v. Wilson*, 14 John. 377; *Williamson v. Henly*, 19 Eng. Com. Law, 87.

Carpenter, for appellee, cited *Spaulding v. Oakes*, 42 Vt.; 2 Smith L. Cases, 393 [337] and notes; *Colburn v. Putnam*, 11 Crompt., Mees. & Ros. 73, and cases there cited; *Merryweather v. Nixan*, 8 T. R. 186; *Shackell v. Rosier*, 2 Bing. N. C. 634; also in 29 Eng. Com. L. 695; *Fivaz v. Nicholls*, 52 Eng. Com. L. 501, and cases there cited; *Acheson v. Miller*, 18 Ohio (O. S.) 1, 2 Ohio (N. S.), 203; *Cumpston v. Lambert*, 18 Ohio, 81; *Moore v. Appleton*, 28 Ala. 633; *Davis v. Burnett*, 4 Jones' Law (N. C.), 71; *Bailey v. Bussing*, 28 Conn. 455; *Hilliard on Torts*, 179, 185, 195, note a, and cases there cited; *Gregg v. Wyman*, 4 Cush. 326; *Toler v. Armstrong*, 4 Wash. C. C. 297, and 11 Wheaton, 258.

PIERPONT, C. J. (after stating facts.) The plaintiff is here seeking to compel the defendant to indemnify him for the damage which he has sustained, in consequence of publishing a libel, at the request of the defendant, and from the consequence of which the defendant agreed to save him harmless.

The question is, whether such an agreement as the plaintiff sets out in his declaration can be legally enforced.

The general principle, that there can be no contribution or indemnity, as between joint wrong-doers, is too well settled to require either argument or authority.

To this rule there are many exceptions, and prominent among them is the class of cases where questions arise between different parties as to the ownership of property, and a third person, supposing one party to be in the right, upon the request and under the authority of such party, does acts that are legal in themselves,

but which prove in the end to be in violation of the rights of the other party, and he, in consequence thereof, is made liable in damages. If in such case there was a promise of indemnity, the law will enforce it, and if there was not, if the circumstances will warrant it, the law will imply a promise of indemnity, and enforce that. Of this class are most of the cases cited and relied upon by the counsel for the plaintiff, such as *Betts v. Gibbins*, *Adamson v. Jarvis*, *Wooley v. Batte*, *Avery v. Halsey*, etc. But we apprehend that no exception has ever been recognized broad enough to embrace a case like the present; indeed, such an exception would be a virtual abrogation of the rule.

In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known. The publication not only subjects the party publishing to a prosecution by the person injured for damages, but also to public prosecution by indictment. In either case, all that would be required of the prosecutor would be to prove the publication by the party charged. The law in such case presumes malice and damage, and the prosecutor would be entitled to a judgment, unless the party charged could introduce something by way of defense that would have the effect to discharge him from legal liability; failing in that, the party would be made liable upon a simple state of facts, all of which he perfectly understood at the time he commenced his unjustifiable attack.

In this case, both these parties knew that they were arranging for and consummating an illegal act, one that subjects them to legal liability, hoping, to be sure, that they might defend it; but the plaintiff, fearing they might not be able to do so, sought to protect himself from the consequences, by taking a contract of indemnity from the defendant. To say under such circumstances that these parties were not joint wrong-doers, within the full spirit and meaning of the general rule, would be an entire perversion of the plainest and simplest proposition. This being so, the law will not interfere in aid of either. It will not inquire which of the two are most in the wrong, with a view of adjusting the equities between them, but regarding both as having been understandingly engaged in a violation of the law, it will leave them as it finds them, to adjust their difference between themselves as they best may.

But it is said, in argument, that to apply this rule in a case like

Atkins v. Johnson.

the present is an encroachment upon the "freedom of the press." We do not so regard it. The freedom of the press does not consist in lawlessness, or in freedom from wholesome legal restraint. The publisher of a newspaper has no more right to publish a libel upon an individual, than he or any other man has to make a slanderous proclamation by word of mouth.

It is also said that the publisher of a newspaper, in his desire to furnish the public with information of what is transpiring in the community, is liable to be misled and deceived in regard to what he publishes. This is undoubtedly true, and it is equally true that he often is deceived; but in such case he ordinarily has ample means of relieving himself, either by correcting the error, or giving up the name of the author of the objectionable communication. Had the plaintiff in this case given the name of the author of the article to Gregory when he asked for it, he would undoubtedly have cast the responsibility upon the shoulders of him who ought to bear it. By refusing to do this, he put himself in the gap, and voluntarily assumed the whole responsibility, relying on the defendant's guaranty to indemnify him.

But it is further insisted that what is alleged to have transpired between the plaintiff and defendant, after Gregory had called on the plaintiff for the name of the author, constituted a new and independent contract, based upon a new and legal consideration. This proposition we think is not tenable. What passed between the parties on that occasion is a mere reiteration of the original agreement, and based substantially upon the same consideration. It was evidently so regarded by the pleader when he drew the declaration. It is all incorporated in the same count, being a simple narration of the events as they transpired. The promise on that occasion was to save the plaintiff from all harm, trouble and expense in the premises, in case the said Gregory should sue him.

This question was fully considered in the case of *Shackell v. Rosier*, 29 Com. L. 438. In that case the plaintiff, Shackell, was the publisher of a newspaper. The defendant applied to him to publish an article that was libelous on its face, but which the defendant assured him was true. After the publication, the party aggrieved brought his action against the plaintiff for the libel. The defendant thereupon promised the plaintiff, that if he would defend said suit, he, the defendant, would save harmless and indemnify the plaintiff from all payments, costs, charges and

expenses, etc. On trial, there was a verdict for the plaintiff. This was arrested and set aside. PARK, J., says it is impossible to look at this declaration, without seeing that the publication of the libelous matter formed part of the consideration for the defendant's promise. "It would be productive of great evil, if the courts were to encourage such an engagement as this, and thereby hold out inducement to the propagation of illegal and unfounded charges;" and then quotes from Lord LYNDBURST as follows: "I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the offense." VAUGHN, J., says: "In this case the court itself would become accessory to the publication of libels, if it was to enforce such a contract as the present." BOSANQUET, J., says: "I am of the opinion that the promise and consideration both appear on the record to be illegal. The promise is to save harmless and indemnify the plaintiff, etc. It appears that the publication was made at the solicitation of the defendant, a publication manifestly illegal, and open to indictment; at once the subject of an action at the suit of the party offended, and an offense against the public. The case does not therefore fall within the principle laid down by Lord KENYON, in *Merryweather v. Nizan*, as the act done by the plaintiff here was unlawful within his own knowledge." The principles recognized and promulgated in this decision cover substantially the whole case now before us.

The position, in which the facts confessed upon the record place the defendant, is not an enviable one. He seems to have originated the mischief—to have induced the plaintiff to aid him in carrying it into effect, by assurance of the truth of the statements, and a promise of indemnity, and after standing by and seeing the plaintiff amerced in damages, takes advantage of a strictly legal defense, and throws the whole responsibility upon the plaintiff. Personally, it would have given me satisfaction to have decided the case for the plaintiff, if it could have been done without violating well-established and salutary rules of law.

Judgment of the county court is affirmed.

NOTE.—In *Coldburn v. Putmore*, 4 Cr. M. & R. 73, the proprietor of a newspaper sued his editor for falsely, maliciously and negligently inserting a libel therein, without the knowledge, consent or authority of the plaintiff, "in consequence of which the plaintiff was convicted and fined for falsely and maliciously printing and publishing the said libel." The case was decided on a technical error in the pleadings; but the question whether a newspaper proprietor, convicted

Gould v. Stevens.

and fined in consequence of the publication of a libel by his editor, without his knowledge or consent, could maintain an action against his editor for indemnity, was elaborately discussed at the bar, during the argument, and the court, in delivering judgment, expressed a strong opinion that he could not. "I am not aware," said Lord LYNCHBURST, C. B., "of any case in which a man convicted of an act declared by law to be *criminal*, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offense, in order to procure indemnity for the damages occasioned by that conviction; but, after hearing the argument, I entertain little or no doubt that such an action could not be maintained."

So in *Arnold v. Clifford*, 2 Sumner, 338, it was held that a promise to indemnify the publisher of a libel is void. "No one," said Judge STORY, "ever imagined that a promise to pay for the poisoning of another, was capable of being enforced in a court of justice."—*REU.*

GOULD v. STEVENS, appellant.

(48 Vt. 125.)

Promissory note — consideration — bona fide holder.

Plaintiff knowing the maker, but not the payee of a negotiable promissory note of \$300, bought it before due, at a discount of \$50, from a stranger, who refused to guarantee its payment. *Held*, that the circumstances were sufficient to put plaintiff on inquiry as to the consideration of the note.

ACTION on a promissory note by Gould, holder and assignee of Benton, against Stevens, maker. The note is as follows:

"\$300

MONTPELIER, VT., October 28, 1867.

"One year after date, I promise to pay Stephen Van Dresler, or bearer, three hundred dollars, payable at the First National Bank of Montpelier, Vt., for value received, with interest.

" N. S. STEVENS."

The note was originally given for a patent right for a horse pitchfork, which proved to be worthless.

Plaintiff purchased the note, before due, of one Owen, a stranger, at a discount of \$50. Plaintiff knew the maker, but not the payee of the note; but requested Owen to guaranty its payment, which he refused to do. The points argued and the rulings of the court below appear in the opinion.

Verdict for plaintiff.

Burns & Haywood, for appellant.

J. B. Benton and George N. Dale, for appellee, cited Greenl. on

Ev., Vol. 2, § 172; *Bailey v. Bidwell*, 13 M. & W. 73; *Parsons on Bills and Notes*, Vol. 1, 186, 187, and cases there cited; *Ross v. Bedell*, 5 Duer, 467; *Benior v. Paquin*, 40 Vt. 205; *Clark v. Pease*, 41 N. H. 414, and cases there cited; *Perkins v. Prout*, 47 N. H. 389; *Garland v. Lane*, 46 N. H. 245; *Britton v. Bishop et al.*, 11 Vt. 70; 14 Penn. State R. 14.

WILSON, J. (after stating the substance of the bill of exceptions). The defendant claimed that it was for the jury to say whether the circumstances were such as to put said Benton, as a prudent man, on inquiry as to the consideration and validity of the note, and asked to go to the jury on this question. But the county court decided that upon the evidence the plaintiff was entitled to stand in the position of a *bona fide* holder for value, without notice, and directed a verdict for the plaintiff. In this, we think, the court below erred. The circumstances were such as to excite suspicion, and lead a prudent man to suppose there might be something relating to the note that rendered it invalid. This was and is the tendency of the circumstances disclosed by the testimony of Benton himself. The maker of the note was apparently good, and of this Benton had knowledge. A stranger to Benton called on him and offered to make, and did make, a large discount on the note, in the sale of it, and refused to guaranty its payment. Benton did not know or have any communication with the payee of the note. These facts were sufficient to put Benton on inquiry, and it cannot be assumed that he would not have learned anything about the consideration of the note. If he had inquired of the maker of the note, he would, most likely, have learned that the note was given for a patent right; that the payee represented it valuable; that he had not tested it, and whether it was a valid note or not would depend upon future experiments with the fork. We think the case should have been submitted to the jury to determine, upon the evidence, whether Benton, on reasonable inquiry, could have ascertained that the note was without consideration.

The judgment of the county court is reversed, and the cause remanded.

NOTE.—The doctrine of this case, that suspicious circumstances will per se vitiate the title to commercial paper, was first held in *Gill v. Oubé*, 3 B. & C. 466, but it was afterward distinctly repudiated in *Crook v. Jada*, 5 B. & Ad. 909; *Goodman v. Harvey*, 4 Ad. & E. 870. Some of the American courts have followed the same doctrine as was held in *Gill v. Oubé*,

Hooper v. Welch.

but the majority have followed a contrary doctrine. In *Hamilton v. Vought*, 34 N. J. 18, the question was directly in point, and was most ably considered by the court, and it was held that in the absence of bad faith, the taking of a note under suspicious circumstances will not avail to defeat it. This is in accordance with the decision of the supreme court of Pennsylvania in *Phelan v. Moss*. See *Post*. To the same effect are *Goodman v. Simons*, 30 How. 343; *Bank v. Neal*, 22 How. 96; *Murray v. Lardner*, 2 Wall. 110, in all of which the doctrine of *Gill v. Cuditt*, is most emphatically denied. See also *Mages v. Badger*, 34 N. Y. 247, *Belmont Branch Bank v. Hope*, 35 N. Y. 65; *Worcester, etc., Bank v. Dorchester, etc., Bank*, 10 Cush. 488; *Matthews v. Pythrees*, 4 Georgia, 287; *Crosby v. Grant*, 36 N. H. 273; *Ellcott v. Martin*, 6 Md. 309. The following decisions, most of them made before *Gill v. Cuditt* was overruled in England, adopted the rule of that case. *Sandford v. Norton*, 14 Vt. 236; *Hall v. Hale*, 8 Conn. 336; *Cove v. Baldwin*, 12 Pick. 545; *Boyd v. McFoor*, 11 Ala. 823; *Nicholson v. Patton*, 13 La. 213; *Smith v. Mechanics' Bank*, 6 La. An. 610.—*RER*.

HOOPER v. WELCH, appellant.

(43 Vt. 169.)

Attorney's lien — settlement — default.

The parties to an action, in which defendant had been defaulted and the case continued, made a settlement. *Held*, that plaintiff's attorneys were not entitled to have judgment rendered in favor of plaintiff against defendant to secure a lien for counsel fees.

ACTION of covenant. The facts appear in the opinion. *Pro forma* rule that judgment be rendered for plaintiff for the amount of counsel fees. Defendant excepted.

Elisha May, for appellant.

Leslie & Rogers, for appellee.

WILSON, J. This action is covenant, on a warranty deed from the defendant to the plaintiff of certain land in Groton, declaring that the defendant had no title to the lot which the deed purports to convey. The defendant was defaulted and the action continued from term to term, to the June term, 1870. On the 9th day of April, 1870, the defendant purchased the land in question, and paid the plaintiff the price agreed on, which purchase and payment the parties agreed should be a full settlement of this suit, and in that settlement it was further agreed that each party should pay his own costs. At said June term, Leslie & Rogers, who had been and were counsel for the plaintiff in the suit, claimed a judgment

in favor of the plaintiff against the defendant for the benefit of said counsel, notwithstanding said settlement. Leslie & Rogers claimed this upon the ground that the settlement had been made, as they alleged, in disregard or in fraud of their *lien*, as attorneys, for their reasonable fees and expenses in the cause. We think that no such *lien* existed in this case as in law would bind the defendant, or prevent his making a *bona fide* settlement of the litigated claim. At the time of the settlement no judgment had been perfected. The entry of the default did not constitute a perfect judgment. Such entry would authorize making up the judgment at such time as the court should direct, and for such sum in damages as might be found from the evidence the plaintiffs should recover. In *Young v. Dearborn*, 7 Foster, 324, cited by the plaintiff's counsel, the court decided that the *order* that judgment be rendered on the verdict would take effect from the date of the order, and would be deemed the judgment so far as to give the attorney a *lien* for his fees and disbursements in the suit, provided such lien was in other respects established. It would seem upon principle and adjudged cases, that ordinarily, even after final judgment has been rendered, *notice* to the judgment debtor, of the attorney's *lien*, is necessary in order to protect it against a *bona fide* settlement and payment of the debt by the debtor, made in ignorance of the existence of such lien. The attorney of the judgment creditor does not in all cases have a lien upon the judgment obtained through his agency. He may have been paid for his fees and disbursements in the cause; if not, he may have relied solely upon the personal responsibility of his client. The right to offset mutual judgments, recovered between the same parties in the same court, is paramount to an attorney's lien, and it would be defeated by such offset. Cases frequently arise where the judgment debtor has legal or equitable claims against the judgment creditor, existing at the time the judgment was rendered, which could not be pleaded in offset at that time, or the defendant may have neglected to plead the same; but there exists a *bona fide* debt, which the parties are willing and desire to adjust and apply upon the judgment. In many cases it is more convenient to pay the judgment to the creditor himself than to pay it to his attorney. The law seems to be well settled, first, that an attorney has, as between himself and his client, a general lien upon all papers in his hands and upon the balances equitably due thereon, not only for his expenses incurred

Hooper v. Welch.

in the particular suit, but for any balance due him. Story on Agency, 2 Kent Com. 640, 641. Second, that a party has generally the right, independent of his attorney or counsel, to control and compromise his suit until final judgment is obtained. 2 Vt. 99; 15 id. 544; 18 id. 614; 7 Foster, 324. Third, that an attorney has a lien upon a judgment recovered through his agency, for his reasonable fees and disbursements; which lien he can, by notice to the judgment debtor, protect against payment of the judgment by the debtor to the creditor, or any settlement between them. In *Young v. Dearborn*, above cited, BELL, J., says: "Ordinarily, notice of the attorney's claim and of his reliance upon the judgment recovered or expected for the payment of his claim, is necessary to be shown in order to render his lien effectual against the adverse party, or for the purpose of charging such party with any fraudulent intention to defeat the attorney's *lien* for his fees and disbursements. But actual notice of the claim of the attorney is not necessary in all cases for the protection of his rights. If the party acts in the face of circumstances which are sufficient to put him on inquiry, he acts contrary to good faith and at his peril." The principle is recognized in *Lake v. Ingham*, 4 Vt. 158, and in other cases decided in this State. There is no testimony in the case tending to show that either party intended to defraud the plaintiff's attorneys; nor does the case disclose the existence of any circumstances, prior to or at the time of the settlement, sufficient to put the defendant on inquiry. But as no judgment had been perfected, we have no occasion to decide any question as to notice, or the sufficiency of notice, or whether the subject-matter of the suit would bring it within any exception to the general rule if it had been shown that the settlement was made with any fraudulent intention to defeat the attorney's fees or disbursements."

The judgment of the county court is reversed and judgment for the defendant to recover his costs.

McLELLAN v. JENNESS, appellant.

(48 Vt. 188.)

Tenant in common—form of action—misuse of common property.

A. and B. and three others owned together a main aqueduct leading from a spring, and each one had his own branch aqueduct. In an action by A. against B. for using or wasting more than his fifth of the water; *held*, (1.) that case sounding in tort, and not an action of account, was the proper form of action; and (2.) that the following charge to the jury was correct: "Did the defendant willfully and knowingly use or waste more than his one-fifth of the water, or knowingly suffer his family to do it, for the purpose of annoying or injuring the plaintiff, or with a wanton disregard or indifference to the inconvenience it might occasion the plaintiff? If the defendant did so, and thereby the plaintiff has suffered injury, then the defendant is liable."

ACTION on the case by McLellan against Jenness.

It appears that the plaintiff and defendant and three others owned together a right to draw water from a certain spring. They also owned together a main aqueduct bringing water from the spring into the village of Sheffield, a distance of some 200 rods and more; that each owned the right to one-fifth of the water which is brought in this main aqueduct; that to avail themselves of this right each one of these five proprietors owns a branch aqueduct which he has laid himself, connecting with the main aqueduct, in order to carry the water to his own house; and that this state of things has existed ever since the water was first brought into the village, some time in 1867, or early in 1868. The jury have found that the defendant willfully and knowingly has used or wasted more than his one-fifth part of the water which came in the main aqueduct, or knowingly suffered his family to do it, for the purpose of annoying or injuring the plaintiff, or with a wanton disregard or indifference to the inconvenience it might occasion to the plaintiff; and that the plaintiff has been thereby injured by being deprived of water to which he was entitled through his aqueduct.

At the trial the defendant moved for a nonsuit on the ground that the parties were tenants in common, and that an action of this nature could not lie. The motion was overruled and defendant excepted. The following is the portion of the charge to the jury which is material to the case:

"In these actions upon the case, like this, it is necessary, in order

McLellan v. Jenness.

for the plaintiff to recover, that he should in the first place show that the defendant is under an obligation or duty towards him in respect to the matter complained of, and in the next place that the defendant has been guilty of a breach of that duty, and in the third place that an injury has consequently happened to him.

"So far as the first of these three propositions is concerned, it is made out. The relation of these two parties to this property and to each other created the duty of the defendant towards the plaintiff, and on the part of the plaintiff towards the defendant, to use the water in good faith and with reasonable regard to the right of the other party to his share of it.

"The question is, whether or not the defendant has been guilty of a breach of this duty, so that the plaintiff has been injured thereby. Another mode of stating this question, and perhaps a complete statement of the real issue in the case, is this: 'Did the defendant willfully and knowingly use or waste more than his one-fifth of the water, or knowingly suffer his family to do it, for the purpose of annoying or injuring the plaintiff, or with a wanton disregard or indifference to the inconvenience it might occasion to the plaintiff?' If the defendant did so, and thereby the plaintiff has suffered injury, then the defendant is liable. Unless the plaintiff establishes that he did this, and that he thereby has suffered an injury, the defendant is not liable."

Ross & Smith for appellant cited 2 Blackstone's Com. 183; 2 Saunders' Rep. 47, f. and g.; *Tubbs v. Richardson*, 6 Vt. 442; *Hurd v. Darling*, 14 Vt. 214.

J. Bartlett, for appellee.

PECK, J. (after stating facts.) The legal proposition in the charge, that the relation of these two parties to this property and to each other creates the duty, each to the other, to use the water in good faith and with a reasonable regard on the part of each to the right of the other to the use of his proportional share, is correct. Each should so use his own as not unnecessarily to injure the others. This does not seem to be questioned by the defendant's counsel, nor is it denied that the charge, so far as relates to the acts and conduct of the defendant himself personally, required the jury to find, in order to warrant a verdict for the plaintiff, all

that is in law necessary to render the defendant liable to the plaintiff in some form. But it is insisted that in the alternative in the charge, based on the liability of the defendant for the conduct of his family in the matter, there is error. It is claimed that the charge in this respect does not require the jury to find such facts as are necessary to constitute that active participation by the defendant in the wrongful conduct of his family which is necessary to make him responsible for their acts. If the verdict is based on this alternative in the charge, the jury must have found that the defendant, for the purpose of annoying or injuring the plaintiff, or with a wanton disregard or indifference to the inconvenience it might occasion to the plaintiff, knowingly suffered his family to use or waste more than the defendant's one-fifth of the water, to the injury of the plaintiff, by depriving him of his rightful portion thereof which he was entitled to have flow to his house through his branch aqueduct. The word *suffer*, used in the charge, means to *allow* or *permit*, and from the whole charge must have been so understood by the jury. Whether it was a *voluntary*, or a *negligent* permission, is not material; for in whichever sense it is understood, it is sufficient, in connection with the other finding of the jury, to charge the defendant with the acts of his family in a matter of this kind, either upon the ground of a voluntary permission on his part, or upon the ground of culpable negligence for not preventing or attempting to prevent the known misconduct of his family in his business and under his control.

But it is insisted that the parties are tenants in common, that the proper remedy is an action of account, and that an action on the case sounding in tort would not lie. As applicable to remedies of this character between tenants in common, the true principle is stated by KENYON, Ch. J., in *Martyn v. Knowllys*, 8 T. R. 145, that, "if one tenant in common misuse that which is in common with another, he is answerable to the other in an action as for misfeasance." That was an action on the case by one tenant in common against his co-tenant for cutting certain trees upon the common land. The right to maintain the action was fully recognized, if the fact showed that the trees were not proper to be cut; but the plaintiff failed to recover solely on the ground that it appeared that the trees in question were of proper age, and in other respects fit and proper to be cut. Whether one tenant in common is to be regarded as a wrong-doer, so that an action of tort lies

against him by his co-tenant, depends on the kind of property, the implied authority of tenants in common as between each other, the nature, tendency and effect of the act done. In relation to real estate, there is an implied authority for a tenant in common to occupy the whole for himself and co-tenant, if his co-tenant does not choose to occupy with him. Hence, if one occupies the whole or more than his share, he is liable to account for rents and profits in an action of account. But as the nature of real estate is such that the occupancy by one tenant in common does not necessarily exclude the other, if one oust or exclude the other from the possession, the latter is not bound to seek his remedy by action of account, but may recover to the extent of his title in ejectment, and thereupon at common law have his action of trespass for *mesne* profits, which in this State he would recover in the same action. *Goodtitle v. Tombs*, 3 Wils. 118, was such action of trespass by one tenant in common against his co-tenant, "for the recovery of damage sustained by being kept out of possession by his companion Tombs," where the point was made that account would lie in such case, but not trespass, by one tenant in common against his co-tenant. But it was held that the action of trespass was a remedy to which the plaintiff had a right to resort; and among the reasons assigned by GOULD, J., is this, "that the plaintiff in this case is not confined to the very *mesne* profits only, but he may recover for his trouble, etc.; I have known four times the value of the *mesne* profits given by a jury in this sort of action of trespass; if it were not to be so, sometimes complete justice could not be done to the party injured." WILMOT, C. J., says, "damages are not confined to the mere rent of the premises; but the jury may give more if they please, as my brother GOULD hath said." Where there is a wrong there is a remedy, and the remedy should be adequate to the injury. The injury complained of in the case at bar results from the wrongful act or culpable negligence of the defendant. An action of account would be ill adapted to redress the wrong, as the cause of action arises from tort; and also for the reason that there could be no known or just basis of accounting; the water of which the defendant wrongfully deprived the plaintiff having no such definite, ascertainable or marketable value as to furnish any rule of compensation. The defendant is a wrong-doer; the cause of action is founded on tort, and the appropriate remedy is for damages; the compensation or recovery is not to be

measured by the price of water, or by the benefit received by the defendant, which may have been none at all, but by the injury to the plaintiff from the unlawful disturbance of his right by the defendant, together with such exemplary damages as the circumstances will warrant. An action of account would be not only inappropriate but manifestly an inadequate remedy. It is insisted that an action of this character will not lie unless there is a destruction of the subject-matter of the tenancy in common. But it is an error to suppose, because in order to maintain trespass or trover for a chattel by one tenant in common against a co-tenant, that a destruction of the thing or something equivalent must be shown, that it follows that no action *ex delicto* can be maintained by the one against the other, short of proof of a destruction of the property. The objection to trespass and trover in such cases often is purely technical, and peculiar to these two forms of action; in trespass the want of an unlawful taking; and in trover for the reason that it is not every injury to property, by one in lawful possession, that amounts to a technical conversion, although it be a ground of action on the case. In *Cubitt v. Porter*, 8 Barn. & C. 257 (15 Com. L. R. 211), LITTLEDALE, Justice, after saying that trespass lies by one tenant in common against his co-tenant who destroys the subject-matter of the tenancy in common, as if one tenant in common destroys the whole flight of a dove-cote, or all the deer in their park, says, "in other cases, where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste or an action on the case will lie by one tenant in common against another; as if one tenant in common of a wood or piscary does waste against the will of the other he (that other) shall have waste; or if one corrupt the water, the other shall have an action on the case." CHITTY, speaking of the action of trespass between tenants in common of chattels, says, "if the thing be destroyed, trespass lies, and case may be supported for injuring the thing." 1 Chitty's Pl. 91. In Comyn's Dig., Title "Estates (K. 8), Tenants in Common," it is said: "If one corrupt the water the other shall have an action on the case." COKE Lit. 200 b. is to the same effect. If so in case of corrupting the water, it must be so in case of one tenant in common wrongfully depriving the other of it; and whether wholly or in part can make no difference as to the right to maintain an action *ex delicto*. To the extent the plaintiff was deprived of the water to which he was

McLellan v. Jenness.

entitled, it was practically destroyed; but whether a destruction or a misuse, is immaterial. Chit. Pl. 91. In England one commoner maintains an action on the case against another commoner for surcharging the common, whereby the plaintiff is unable to enjoy the common in so ample and beneficial a manner as he ought and otherwise would. *Hobson v. Todd*, 4 T. R. 71; although the only interest which a commoner has in the common is, in legal phrase, to eat the grass with the mouths of his cattle. In *Chesley and others v. Thompson*, 3 N. H. 9, it was decided that an action on the case could be maintained by the plaintiffs who were tenants in common with the defendant of a mill, for the negligence of the defendant in the manner of the keeping of the fire in the mill, by means of which the mill was burned. There is no principle that requires the destruction to be total in order to maintain the action in such case. In *Blanchard v. Baker et al.*, 8 Greenl. 253, it is held that one tenant in common may maintain trespass on the case against his co-tenant for diverting the water from their common mill for separate purposes of his own. So in *Odiorne v. Lyford*, 9 N. H. 502, it is decided that if one tenant in common of a mill erects a dam below on the same stream upon his several estate, and thereby flows the common property, to the injury of his co-tenant in respect to it, the latter may maintain an action on the case therefor against him for damages. In each of these three cases, the objection was made that the action would not lie by one tenant in common against his co-tenant, and overruled. This objection is well answered in *Odiorne v. Lyford*, by PARKER, C. J., in a manner applicable to the objection in this case, when he says, "the act of the defendant in flowing the common property in this case, if without right, is not a mere entry and possession as a tenant in common subjecting him to account for the profits, but is an act which tortiously deprives the plaintiff of the use of the property, and is in the nature of a destruction of the use for which it was intended." Angell & Ames, on Watercourses, lays down the same principle that is acted on in these cases. The case at bar is still stronger in favor of an action of trespass on the case than the cases already alluded to. There is an additional reason in support of such action in this case which does not usually exist in actions of this character between tenants in common. The parties by their separate branch aqueducts, which each had constructed for himself to carry his portion of the water from the common main aqueduct to his dwelling-house, had made a

 Boynton v. Farmers' Mutual Fire Insurance Co.

practical division according to their several rights. While acting under this arrangement, and thus enjoying each his portion in severalty, each had a several easement or right to have his share of the water flow through his own several aqueduct to his dwelling-house, for his several and exclusive use. To this extent, the right of the plaintiff is several, and the damage resulting from the wrongful act or culpable negligence of the defendant is not common to the plaintiff and defendant, as in ordinary cases of actions of tort by one tenant in common against his co-tenant for injury to the common property, but is several to the plaintiff. Upon the facts in this case, clearly the ownership in common of the right to take water from the spring, and ownership in common of the main aqueduct, does not justify or excuse the defendant, or defeat the action.

Judgment affirmed.

 BOYNTON, appellant, v. FARMERS' MUTUAL FIRE INSURANCE CO.

(48 Vt. 256.)

Fire insurance — assignment of policy — ratification.

A policy of fire insurance was issued on buildings by a company, whose charter declared that, when any buildings insured should be alienated, the policy should thereupon be void "*provided, however*, that the grantee or alienee, having the policy assigned, may have the same ratified and confirmed * * * upon application to the directors and with their consent, within thirty days next after such alienation." The buildings covered by this policy were conveyed, and the policy was assigned by the assured. A loss by fire occurred on the eighth day after the alienation, whereupon, the company were immediately informed of the loss and an application was made by the assignee for a ratification. The company refused arbitrarily and without cause; and on a bill brought in chancery praying for relief,—*held*, that the assignee was entitled to recover of the company for the loss, the same as if they had ratified the assignment.

BILL in chancery, by Boynton against The Farmers' Mutual Fire Insurance Company.

The object of the orator's bill of complaint is to recover certain sums of money for loss and damage of property insured by the defendant company. On the 12th of August, 1863, one Charles Jewett effected an insurance in the defendant company upon

Boynton v. Farmers' Mutual Fire Insurance Co.

buildings located upon his farm in Hyde park. It was and is the custom of said company to demand and receive, at the time of making their insurance contract, a sum sufficient to cover the whole claims of the company, the whole term of the policy, without making other assessments on the premium note. Jewett did pay to said company, at that time, the required sum in cash as *premium*, and the sum so paid was the whole amount it was expected would be required to be paid to defendant on said policy for the term of five years which it was to remain in force. The property was insured to said Jewett, his heirs and assigns. The policy contains, among other things, the following clause: "And we do therefore promise, according to the provisions of the act of incorporation and the by-laws of said company, which are to form a part of this contract, to settle and pay unto the said assured and heirs, executors, administrators or assigns, all loss or damage not exceeding in the whole the sums aforesaid, which shall or may happen to the aforesaid property by reason or by means of fire during the time this policy shall remain in force." On the 11th of November, 1865, the said Jewett's administrator sold said farm and buildings to the orator and conveyed the same to him, by deed of that date, duly executed, delivered and recorded, and on the same day assigned said policy of insurance to the orator. On the 19th of said November, said buildings were destroyed by fire, and on the 20th of the same month the defendant was duly notified of said transfer and assignment to the orator, and requested to ratify and confirm the same to him, but refused.

The defendants demurred to the bill; and a *pro forma* decree of dismissal was entered. The orator appealed.

R. C. Benton, for appellant, cited *Powles v. Inness*, 11 M. & W. 10; *Wakefield v. Martin*, 3 Mass. 558; *Earle v. Shaw*, 1 John. Cas. 318; *Constant v. Insurance Co.*, 3 Wall, Jr. 313 (rep. in A. M. Law Reg. N. S. 116); *Com. Ins. Co. v. Union Mut.* 19 How. (U. S.) 318; *New Eng. Ins. Co. v. De Wolf*, 8 Pick. 62; *McCullough v. Eagle Ins. Co.*, 1 Pick. 280; *Wheaton's Note*, Am. Law Reg. 1, 123 and cases there cited; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; 2 Am. Lead. Cas. ed. of 1857, pp. 613, 632; *Wilson v. Hill*, 3 Metcalf, 66; *Folsom v. Belknap Ins. Co.*, 10 Foster, 231.

Wells & Redfield, for appellees, argued that the alienation of the property insured annulled the contract of insurance, and cited *Angell on Ins.* §§ 191, 211; *Wood v. Rutland and Addison Mut.*

Boynton v. Farmers' Mutual Fire Insurance Co.

Fire Ins. Co., 31 Vt. 552; Kent's Com., 3d Vol., p. 375, note b; Ohio, L. S. 253; 2 Atk. 554, and especially where the words are express, as in this case. In the language of the charter he "may have his policy confirmed on application to the directors," with their consent. 1 Ph. on Ins. 58, 59; *Dadmun Manf. Co. v. Worcester Mut. Fire Ins. Co.*, 11 Met. 429; Ellis on Ins. 143-6; *Carpenter v. Washington Ins. Co.*, 2 Am. L. C. 602, 603; Story, J. id. 612, 613. Even an assignment for the benefit of creditors, invalidates the policy. 1 Phillips on Ins. §§ 879, 880; *Smith v. Saratoga Ins. Co.*, 3 Hill, 508; 1 id. 497; *Western Ins. Co. v. Riker*, 10 Mich. 279; *Ayers v. Hart. Ins. Co.*, 17 Iowa, 176; *Tomlinson v. Monmouth Ins. Co.*, 47 Maine, 232; *Lawrence v. Holyoke Ins. Co.*, 11 Allen, 387; Ch. J. SHAW in *Wilson v. Hill*, 3 Met. 66.

WILSON, J. (after stating facts). It is insisted by the defendant's counsel that the sale and conveyance of the property rendered the policy absolutely void; that the company not only did not ratify, but had the arbitrary right to refuse to ratify the policy to the orator. It has been observed that the act of incorporation and by-laws of the company are a part of the contract. Section four of the charter declares that when any building shall be alienated by sale or otherwise, the policy shall thereupon be void: "Provided, however, that the grantee or alienee having the policy assigned, may have the same ratified and confirmed to him, her or them, for his, her or their use and benefit, upon application to the directors and with their consent, within thirty days next after such alienation, on giving proper security to the satisfaction of said directors, for such proportion of the deposit or payment notes as shall remain unpaid, and by such certification and confirmation the party causing the same shall be entitled to all the rights and privileges, and subject to all the liabilities, to which the original party was entitled and subject under this act." The eighth section of the by-laws provides that, whenever the grantee or alienee of any property insured shall procure an assignment and transfer of a policy, and shall, within thirty days from the day he purchases the same, forward the said policy and assignment to the secretary, he may have the same confirmed and ratified to him, and, when so ratified and confirmed, the secretary shall record the same when the grantee or alienee shall have given satisfactory security for the payment of the premium note given for the policy. It also con-

Boynton v. Farmers' Mutual Fire Insurance Co.

tains the following clause: "*Provided* said policy, after sale, shall be void until confirmed to the assignee." The facts stated in the bill of complaint and admitted by the answer or demurrer, show that Jewett's administrator and his assignee performed, within the time provided in the contract, all it required them to perform to entitle the assignee to have the policy ratified and confirmed to him. The conveyance of the property and assignment of the policy to the orator were made before the loss. The policy and assignment were forwarded to the secretary of the company within the time limited for that purpose, and security given or offered, agreeably to the terms of the contract.

It is claimed by the defendant that the assignee can have no interest in the insurance unless the insurers approve the assignment, and by such assent make a new contract with the assignee. This position incorrectly assumes that such a policy is a personal contract merely with the original party, and that it is rendered void by the conveyance until confirmed by a new contract with the assignee, notwithstanding the assignment of the policy to him. The defendant's interpretation of the contract is, that the purchaser of insured property may have the insurance assigned to him; that he shall have a certain time within which to comply with the conditions on which the company, by the terms of the original contract, agreed to confirm the assignment, but in the meantime such assigned policy is void, and if the property is destroyed or damaged by fire before confirmation of the assignment, the company is not liable for such loss or damage. But this is not the legal effect of the defendant's promise. The contract was entered into by and between the company as one of the contracting parties, and Charles Jewett, his heirs and assigns, who constitute the other party thereto. It was a contract to insure not only Charles Jewett, but his heirs and assigns, upon the terms and conditions named in the policy. The terms of the contract and the payment in advance of the insurance premium, show it to have been the intention of the parties to secure to the original party assured, his heirs and assigns, a valuable right for the full term of said insurance agreeably to the stipulations contained in said policy. The insurance made the property more valuable to Jewett while he owned it and more valuable to his estate and assignee. The estate of Jewett was justly entitled to receive of the grantee of the property its value enhanced by the insurance; and the parties to the

Boynton v. Farmers' Mutual Fire Insurance Co.

conveyance and assignment, in negotiating the same, had the right to assume that the company would ratify and confirm the policy to the grantee, upon the conditions specified therein, provided he was a suitable person to be admitted a member of the company, and no good cause existed why the insurance should not remain in force. In such a case the making of a new contract between the company and assignee was not necessary in order to entitle him to the benefit of the insurance. All the assignee could be required to do, under such circumstances, in order to entitle him to have the assignment ratified, was to comply with the terms of the contract between the company and the original party assured, and, having done this, the company was bound to ratify the assignment, unless there was such a change in the situation of the property as would, by the terms of the contract, give the company a right to cancel the policy or increase the rate, and then the assignee could justly claim all rights which the original party could have claimed if he had continued the owner of the property, provided there was no valid objection to the assignee personally. The liability of the company to the original party assured and his estate, for any loss that might happen to the property, ceased when the administrator conveyed it, and the sale would have annulled the policy if he had not assigned it to the orator. Jewett's estate had an assignable interest in the insurance, which the administrator transferred to the orator. His rights under the policy commenced at the time of the assignment. He had thirty days next after he purchased the property to perform the conditions on which the company stipulated in the policy to ratify it to Jewett's assignee, and during which time the insurance remained in force for his benefit. If the company had at any time confirmed the assignment to the orator, such confirmation would relate back to the time the policy was assigned to him. The orator performed the contract as indicated by the policy; hence it remains in force notwithstanding the company refused to ratify the assignment, unless the directors had just cause of refusal. It is undoubtedly true that insurers could, under such a contract, protect themselves against an assignment of the insurance to an unsuitable person for the care of the property, or other cause might exist which would justify the insurers in refusing to ratify an assignment of the policy. The 4th section of the charter provides that the grantee or alienee, having the policy assigned, may have the same ratified and confirmed to him, *on application to the directors*

Goodrich v. Tracy.

with their consent. This should receive a reasonable interpretation.

The construction should be upon the view and comparison of the whole contract, and with an endeavor to give every part of it meaning and effect according to the intention of the parties. The presumption would be that the assignee was a suitable person, unless there was evidence to the contrary. In order to justify the directors in refusing to give their consent to an assignment of a policy, they must have evidence of the unsuitableness of the assignee, or of some other cause of refusal. To allow them the arbitrary right to reject the assignment, would render the insurance less valuable, and it might operate as a fraud upon the assured and his assignee. In this case the company admit that there was no cause for the refusal to ratify said assignment. The directors of the company claimed the right to act and did act arbitrarily in the matter, but in this they erred as to the legal obligation of the contract. We are of opinion that the orator is entitled to relief, according to the prayer of his bill. The *pro forma* decree of the chancellor is reversed and the cause remanded to the court of chancery, with instructions that a decree be entered in favor of the orator, to recover of the defendant the loss on the dwelling-house and shed mentioned in the orator's bill of complaint, the same as if the defendant had assented to and confirmed to the orator the assignment of said policy, and that the orator recover his costs.

Reversed and remanded.

GOODRICH v. TRACY, appellant.

(43 Vt. 314.)

Promissory note — forged signature — payment — wife as agent.

The receipt of a new promissory note, a signature to which is afterwards found to be forged, does not operate as a payment of the original note or an extinguishment of the right of action thereon.

A wife's authority in business matters is special and limited, and when she exceeds that authority, her husband is not bound.

ACTION on a promissory note by the payee, Goodrich, against Tracy, one of two joint and several makers. The note in suit was given January 4, 1868, by one Sanderson and the defendant, the name of defendant being added for security. The negotiations

leading to the making of this note were carried on through the wife of plaintiff. About the time the note became due, Mrs. Goodrich, at the request of her husband, the plaintiff, wrote to Sanderson demanding payment of the note, to which he replied that he could not at that time, but would give a new note with other sureties. Accordingly a new note was given, with the signature of one Bliss as security. Defendant then called upon Mrs. Goodrich and asked for the original note, which was presented to him, whereupon he tore off the signatures and handed it back. The signature of Bliss to the new note was forged. At the trial, defendant offered to prove certain acts and admissions of plaintiff's wife, to the effect that the note had been paid, thus preventing defendant from taking precaution to secure himself. This evidence was excluded, and defendant excepted. It also appeared that the note had not been stamped until after the signatures had been torn off, wherefore defendant contended that the note was void. The court ruled otherwise and defendant excepted. Verdict for plaintiff for \$400, the amount of the note, and interest. Defendant appealed.

Lawrence & Burnap, for appellant.

E. R. Hard, for appellee.

ROYCE, J. This was an action of assumpsit on a promissory note which the defendant signed as surety for one Sanderson. It was not claimed in the court below that the note in suit had ever been paid or discharged under the circumstances detailed in the exceptions, unless the receipt of the note, dated January 1st, 1869, operated as a payment or discharge. It was admitted that this last note, as far as Bliss was concerned (and he was regarded by the plaintiff as the responsible party), was a forgery. The plaintiff received this note in good faith, and did not know but that the signatures to it were genuine until after the note in suit had been given up. Can the receipt of this note be regarded as a payment or extinguishment of the right of action upon the note in suit? We think not. In the case of *Puckford v. Maxwell*, 6th Term, 52, the defendant being arrested by the plaintiff for £80, gave to the plaintiff a draft for £45, and agreed to settle the remainder in a few days, and was discharged out of custody. The draft was dishonored, the defendant having no effects of the drawee in his hands, whereupon the defend-

Goodrich v. Tracy.

ant was again arrested upon the same affidavit. He obtained a rule calling on the plaintiff to show cause why he should not be discharged out of custody; and Lord KENYON, in giving the opinion, says, that in cases of this kind, if the bill which is given in payment does not turn out to be productive, it is not that which it purports to be and which the party receiving it expects it to be, and therefore he may consider it as a nullity and act as if no such bill had been given at all. This case has been frequently cited with approbation, and we see no reason to question its soundness. It was held in *Eagle Bank v. Smith*, 9th Cowen, 74, that a forged note if delivered in payment is no satisfaction or extinguishment of an antecedent demand. The reason for this is obvious. It is not what the person delivering it either expressly or impliedly affirms it to be, and what the person accepting it believes it to be. The law is well settled that the party giving a security in payment vouches for its genuineness, and that payment of a debt in counterfeit or worthless bills is in legal effect no payment, and in such cases the party receiving them may declare upon the original consideration and recover upon the legal liability ensuing therefrom. *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141; *Gilman v. Peck*, 11 Vt. 516; *Torrey v. Baxter*, 13 Vt. 452; *Marble v. Hatfield*, 2 Johns. 455.

In the case last cited, Judge KENT says that a promissory note and a bank note are equally promissory notes for the payment of money, and that there is no presumption that the receiver takes upon himself the risk of forgery. In *Hughes v. Wheeler*, 8 Cowen, 77, it was held that where an usurious note was given as a substitute for a valid note, *which was destroyed by the parties*, that an action lay on the original note. So that it is not material to inquire into the circumstances of the delivery of the note in suit to the defendant by Mrs. Goodrich, or what was said or done in connection with it. For in the view we have taken of the case, conceding all that the defendant claimed he had the right to prove, the plaintiff would still be entitled to his judgment. But we have been unable to discover any error in the rulings of the court, in excluding the evidence offered by the defendant. The only ground upon which it can be claimed that the acts or admissions of Mrs. Goodrich could be given in evidence against the plaintiff is, that she was the agent of the plaintiff so as to be competent to bind him by such acts and admissions. We do not think the evidence showed

any such agency. Her agency only extended to the performance of certain specific acts, and the admissions sought to be proved were not so connected with the performance of those acts as to make them binding upon her principal. Her authority was special and limited, and when she exceeded that authority, her principal was not bound. *White v. Langdon*, 30 Vt. 599; *Upham & Clay v. Wheelock*, 36 Vt. 27. The exception taken on account of the want of a revenue stamp, has not been urged in this court and we treat it as waived.

The judgment of the county court is affirmed.

QUINN v. HARD *et al.*, appellants.

(43 Vt. 375.)

Promissory note—principal and surety—fraud.

A. signed a promissory note as surety for B. with the understanding that B. was to use it in raising funds for prosecuting a profitable business. But B. gave the note to C., the payee, in payment of a pre-existing debt. *Held*, that A. was liable on the note to C. who was innocent of the fraud.

ACTION in assumpsit by Michael Quinn, payee of a promissory note, against E. R. Hard, surety, and C. J. Lane, principal maker. The note in suit was made October 27, 1869, and signed by Hard as surety, at Lane's solicitation, for the purpose, as Lane represented, of raising money to conduct a business operation which was likely to be very profitable. Lane was then insolvent (and has been so ever since), and the real design of procuring the note to be signed by Hard was to pay plaintiff \$200, money borrowed from him on the 23d of September, 1869. Lane used the note in payment of this pre-existing debt. The note remaining unpaid, plaintiff brings this action. Judgment for plaintiff, from which defendant, Hard, appealed.

E. R. Hard, appellant in person, cited *F. & M. Bank*, 36 Vt. 539; *Atkinson v. Brooks*, 26 id. 569; *Mills v. Barber*, 1 M. & W. 425; *Hutchinson v. Boggs*, 28 Penn. 294; *Paton v. Coit*, 5 Mich. 505; *Bissell v. Morgan*, 11 Cush. 198.

Edgerton & Nicholson, for appellee.

Quinn v. Hard.

РЕСК, J. The pre-existing debt of Lane to the plaintiff was a good consideration for the note, both as to Lane the principal, and as to Hard the surety; especially as it appears that the note was delivered and accepted in *payment* of that debt. Not only was the original debt against Lane extinguished by the note received in payment, but the credit was extended sixty days, the period the note had to run. An agreement by a creditor with a third person to forbear the collection of a debt against his debtor for a specified time, is a good consideration for the promise of such third person to pay the debt. But it is urged in behalf of the defendant Hard, that as Lane, by false and fraudulent representations, induced Hard to sign the note, and as Lane at that time was and ever since has been insolvent and destitute of property, the plaintiff has suffered nothing by relying on the note, and therefore Hard ought not to be held reliable. Hard, by signing the note and entrusting it with Lane to be delivered, gave to Lane an apparent authority to use the note for the purpose to which it was applied, and the plaintiff was justified in accepting it as he did upon the faith that Lane had such authority from Hard. The note in the hands of Lane was complete, and payable in terms to the plaintiff, and in fact executed both by Hard and Lane for the purpose of being delivered to the plaintiff. The case therefore differs from that class of cases where the note was incomplete, and perverted by the principal to a use different from that to which the paper itself indicated it was designed, and in violation of the agreement with the surety. In this case the plaintiff having a debt against Lane overdue, and having applied to him for payment, Lane thereupon procures the note in question payable to the plaintiff, and presents it to him in payment of the debt, which the plaintiff accepts; Hard, when he signed the note, knowing that Lane was to deliver it to the plaintiff as a valid note upon which he was to become liable. There was nothing in all this to indicate a want of authority in Lane to deliver the note to the plaintiff in consideration of the indebtedness, or to put the plaintiff on inquiry as to the means by which Lane had induced Hard to sign the note. The plaintiff, as he had a right to do, confided in the note; and the defendant Hard having confided in the representations of Lane by which he was induced to sign the note, Hard, and not the plaintiff, took the risk of the truth of such representations. After the decisions which have been made in this State in cases of this character, and cases involving the same principle, no extensive

examination of authorities is necessary. In *Passumpsic Bank v. Goss and Page*, 31 Vt. 315, it was expressly agreed by Goss the principal, with Page the surety, when the latter signed the note and entrusted it with the former, that he, Goss, would not use it unless he procured the signature of one Brown as co-surety; and it was held that Page was liable, although Goss delivered the note in violation of the agreement, without the name of Brown, or of any one in his stead, upon it. If a delivery of the note in violation of such an agreement binds the surety, it is more clear that a delivery of the note merely upon a different consideration, as in this case, from that for which the surety was induced to believe it was to be delivered, is no defense. It is true that in that case the consideration was advanced on the delivery of the note, but that does not distinguish the case from this in principle. The consideration in the case at bar is of a character that, according to commercial law applicable to negotiable paper, would protect an endorsee upon such consideration from a defense by the maker which might be available against the payee. This being so, it must clearly be a protection to the payee against defenses of this kind, who receives the note without notice; and the insolvency of the original debtor at the date of the note does not constitute an exception. In *Dixon v. Dixon*, 31 Vt. 450, there was an agreement with the surety, Adams, that the principals would not deliver the note unless one Clark or one Onion should be procured by them to sign it as co-surety; and the note was delivered to the plaintiff, the payee, in violation of that agreement, the plaintiff knowing at the time that the defendant Adams was surety for the other signers. It also appeared in that case that the note was delivered in payment of a pre-existing debt to the plaintiff, of the other signers of the note, for which Adams was not liable. Adams, the surety, was held bound by the note. In that case it appeared that Adams did not know, when he signed the note, that it was to be used as a substitute for another note. There is no distinction between that case and the case at bar that can favor the defense in this case. We are referred to *Farmers' & Mechanics' Bank v. Hathaway*, 36 Vt. 539, in support of this defense. In that case it will be seen that the decision turned on the very point in which that case differs from this. The note was payable to the Farmers' and Mechanics' Bank, for \$150, not negotiable. Osgood was the principal and Hathaway the surety, and the note was made for the

Quinn v. Hard.

purpose of obtaining a discount at the bank. Osgood procured Hathaway to sign the note, under an agreement that he would get the note discounted at the bank, and bring back to the defendant Hathaway \$125 in payment of that amount which Osgood then owed Hathaway. Osgood not being able to get the note discounted, he, as the court regarded the facts, passed the note to Adams, to apply on an old debt he owed him; although after Adams obtained the note he got it discounted at the bank and paid it at maturity, and brought the suit in the name of the bank for his benefit. It was decided that the surety was not liable; but in the decision the court fully recognize the correctness of the decision in *Pass. Bank v. Goss & Page*, and in *Dixon v. Dixon et al.* BARRETT, J., in delivering the opinion of the court, says: "The note not being payable to Adams, distinguishes this case from the case of *Pass. Bank v. Goss*, and of *Dixon v. Dixon*. Though it was a perfected instrument, it did not import that it was primarily designed to be delivered to him, and thus carry with it the apparent right to receive it, irrespective of any unknown agreement between the makers. Again he says: "When therefore he (Adams) took it of the principal maker to apply on an old debt, we think he should be regarded as assuming the peril of the perversion of the note from the purpose of it, *as shown by the instrument itself*." In the case before us, the instrument did "import that it was primarily designed to be delivered to him (the plaintiff,) and thus carry with it the apparent right to receive it irrespective of any unknown agreement between the makers;" being in terms payable to the plaintiff.

But it is insisted that it does not appear that the plaintiff took the note *bona fide* and without notice of the fraud practiced upon the surety to induce him to sign. On this point we are referred by the defendants' counsel to cases on the question of the burden of proof in relation to the consideration paid by the plaintiff, and the circumstances under which he acquired title to the instrument, in actions by an endorsee against the maker, when the defendant proves what would constitute a defense as against the payee. In what cases, and to what extent, the burden of proof is thrown upon the plaintiff by proof of such defense, does not appear to be very clearly settled by the books; at least the decisions on the question are far from uniform. In many cases the question depends upon the character of the defense interposed. The cases cited by

defendants' counsel are mainly upon the burden of proof upon the question whether the endorsee was holder for valuable consideration. But it is unnecessary to define the rule on that subject, as the plaintiff is not an endorsee, and is not necessarily subject to the same rule. So far as the question of consideration is concerned, the case shows that the plaintiff was a holder for value, as already stated. Among the cases cited by the defendant is *Paton v. Coit et al.*, 5 Mich. 505, action by endorsee of bill of exchange against acceptor. The defense was illegality of the consideration for the acceptance, the statute in terms making such paper illegal and void, and forbidding any action to be maintained upon it "except when brought by a bona fide holder who has received the same upon a valuable and fair consideration without notice or knowledge," etc. The court held that as the amount of consideration given by the plaintiff was an affirmative fact peculiarly within his own knowledge, and being necessary to bring the plaintiff's case within the exception of the statute, it should be proved by him. But on the subject of want of notice, it is said in the opinion in that case: "We do not propose to give a definite opinion upon the point whether the illegality being first shown, the burden of proof in this case would have rested upon the plaintiff to show actual want of notice; this might be requiring actual proof of a negative. But we are inclined to the opinion that they should have shown the nature of the transaction accompanying the transfer; and if that disclosed no suspicion of such notice, it might make a *prima facie* case of want of notice, and throw upon the defendant the burden of proving notice." Whether this is the true rule as between an endorsee and maker or acceptor, or not, nothing more could be required of the plaintiff in the case at bar than what is indicated by the court in the case last referred to; and the occasion, the consideration, and circumstances of the transaction by which the plaintiff acquired title to the note, as disclosed in the case, fully come up to the requirement in that case. There being nothing in the facts to create a suspicion of notice to plaintiff of any fraud or any suspicion of bad faith on his part, it was for the defendant, if he imputed any such thing, to prove it. In *Bank of State of Missouri v. Phillips*, 17 Mo. 29, it was decided that it was no defense for an indorser who is sued upon a note, that he indorsed it upon the express condition that it should also be indorsed by another person before being delivered, when

 Gibson v. Bingham.

it does not appear that the plaintiff knew of the condition. The plaintiff recovered in that case without any proof of want of notice of the condition on which the defendant indorsed the paper, and we see no legal reason why the plaintiff should not recover in this case.

Judgment affirmed.

GIBSON *et al.* v. BINGHAM, appellant.

(43 Vt. 410.)

Sale—effect of acceptance—voluntary payment.

Where an article, manufactured in accordance with a special contract, is accepted and retained by the vendee, he will be liable for the full contract price, there being no warranty, and the defects, if any, being obvious and patent; and in such a case a judgment obtained by the vendor for an unpaid balance of the contract price is a bar to an action by the vendee to recover for a breach of the contract.

A voluntary payment is irrecoverable by action.

ACTION in assumpsit by T. S. and C. P. Gibson against L. Bingham upon a contract for the manufacture of a hearse.

The plaintiffs contracted with defendant to manufacture and deliver at Rutland, to plaintiffs, a hearse of specific description, for the price of \$210. The hearse was made and delivered to plaintiffs at Rutland, as defendant claims, fully according to the terms of the contract. The plaintiffs claim that in some things it was not fully up to what the contract required. When the plaintiffs received the hearse (which was delivered July 26, 1865), they wrote defendant, saying that they were much pleased with the general proportions of it, suggested that defendant had overlooked plating the "ends of the nuts," "also plated pins." Varnish looked bad, but not defendant's fault, and concludes, "Your money is ready, though we would like to hear from you before sending." The plaintiffs received and retained the hearse without any further intimation to defendant until the 8th of August, when they sent to defendant \$200, with a bill of the cost of making the hearse what the contract called for, amounting to \$15.22, saying, "But we send you \$200, trusting the above is satisfactory."

VOL. V.—37.

The defendant brought a suit to recover the balance of the contract price in Franklin county; the plaintiffs opposed and defended the suit, and appealed it into the county court, but defendant recovered the ten dollars.

The defendant in the present suit insisted that plaintiffs by their letters and their acceptance of the article had waived defects and promised to pay for it, by which they were bound; also that the previous judgment in favor of defendant was a bar to this recovery. The court ruled otherwise. Verdict for plaintiffs; defendant appealed.

Prout & Dunton, for appellant, cited *Smith's Mercantile Law*, 644; *Milner v. Tucker*, 1 Carr & Payne, 15; *Kellogg v. Denslow*, 14 Conn. 411; 3 Pars. on Con. 47; *Kellogg v. Denslow*, 14 Conn. 411; *Sprague v. Blake*, 20 Wend. 60; *Seixas v. Woods*, 2 Caines, 48; *Oneida Manufacturing Co. v. Lawrence et al.*, 4 Cow. 440; *Hargous v. Stone*, 1 Seld. 73; *Barney v. Goff & Cady*, 1 D. Chip. 304; *McAllister v. Reab*, 4 Wend. 485; *Still v. Hall*, 20 id. 51; *King & Mead v. Paddock*, 18 John. 141; *Cutter v. Powell*, 2 S. L. C. 37; *Mondel v. Steel*, 8 Mees. & Wels. 858; *Davis v. Tallcot et al.*, 12 N. Y. 184; *Milner v. Tucker*, 1 C. & P. 15.

C. H. Joyce, for appellees, cited *Gale v. Cooper*, 11 Vt. 597; *Gen. Sta.* 33, § 1; id. 726, § 23; *Scott v. Niles*, 40 Vt. 573; *Carver v. Adams*, 38 id. 500.

REDFIELD, J. (after stating facts). I. The letter from plaintiffs to defendants, on the 26th of July, 1865, contains no intimation that plaintiffs purposed to disaffirm and rescind the contract; on the contrary, the letter after suggestion of some deficiencies in the performance of the contract, and commending the general style of the hearse, proceeds to inform the defendant that the "money is ready," indicating most clearly that they *received* the hearse, accepted it on the contract, and were ready to pay for it as contracted.

In case of warranty or fraud, on the sale of chattels, there is no question; the property sold may be retained by the vendee, and the sale affirmed, yet the right of the vendee to sue upon the warranty, or for the deceit, will not be thereby affected. The warranty is an independent contract, which is purchased by the vendee,

Gibson v. Bingham.

and when broken can be sued like any other violated contract. And this is alike true in case of fraud and deceit. A wrong has been thereby inflicted, and for that wrong the party injured has his redress. This contract was executory; a contract to manufacture an article of a certain kind for a stated price. There is no claim that there was warranty or fraud; and if there were defects, they were obvious and patent. The vendee could either accept the article, and thereby become liable to pay the stipulated price, or he could *reject* it and give notice of the non-acceptance, and bring his action, if he so elects, for the non-performance of the contract; but he cannot do both, nor can he accept it and impose *conditions*, and sue the other party for non-compliance with the conditions which he has imposed. While the vendor is bound to perform his contract, he has the right to the return of the article delivered, or his pay at the stipulated price.

In *Percival v. Blake*, 2d Car. & Payne, 514, which was assumpsit for a vat which had proved defective, ABBOTT, Ch. J., held, if the defects were not discovered and notice given in a reasonable time, it could not be any defence in an action for the price. And in *Milner v. Tucker*, 1st C. & P. 15, BURROUGHS, J., says: "If the goods supplied were not conformable to the order, the buyer must *return* them in a reasonable time, or he will be bound to pay for them."

In *Cash v. Giles*, 3 C. & P. 407, PARK, J., says (in an action to recover the price of a threshing machine which was defective), that "it was the duty of defendant either to have immediately returned or given immediate notice to the plaintiff to fetch it away." In *Growing v. Mendham*, 1 Stark. Ca. 205, which was an action for the price of clover seed sold by sample, the defendant was not allowed to show in defense that it was not according to sample, without proof that he offered to return the seed. The case of *Kellogg v. Denlow*, 14 Conn. 411, is a very thorough analysis of all the cases on this subject and very decisive authority, and we think the rule is well founded on reason and authority.

II. The case shows that on the 8th of August, 1865, the plaintiffs paid to the defendant \$200, as a full payment of the price of the hearse, and notified the defendant that they retained the \$10 as an abatement from the contract price for some deficiencies in the finish of the hearse. The defendant thereupon sued the plaintiffs for the \$10 so abated and retained; the plaintiffs appeared, defended and appealed the case, and were finally cast in the suit. The issue

in that case was, had these plaintiffs the right to retain that \$10, as an abatement from the contract price; and it was decided against them, and this suit is brought to recover back the *same money* which they have paid the defendant on his judgment. This perpetual oscillation, by alternate suits of parties litigant, upon the same subject-matter, if sustained, would be a judicial discovery of a "perpetual motion" which all philosophy has failed to reach. But it is the interest of the State that litigation should cease; and when a right to property has been once put in issue and legally tried, it is in law ended. The determination of the former suit settled the right, as between these parties. It is said by the plaintiffs' counsel, that the plaintiffs' actual claim is \$15.22, and he could not have recovered the balance due him in his defense of the former suit. But the plaintiffs *voluntarily paid* the stipulated price, except \$10, and they could in no event recover back a *voluntary payment*. Their claim was therefore limited by their own act to \$10. If these plaintiffs had sued defendant before he sued them, they could not have recovered the \$10, because they had that in their own hands. They could not have recovered beyond that, because they were precluded by a voluntary payment.

This suit is therefore brought, *because* they have paid the \$10 to defendant in satisfaction of a legal judgment. The judgment is reversed, and the cause remanded.

Our attention has been called to *Carver v. Adams*, 38 Vt. 500, and *Gale v. Cooper*, 11 id. 597, which decided that if a party omits to *plead an offset* he is not thereby precluded from collecting his demand. But there was no offset or question of offset in this case. It was a disputed claim and of *one single item*.

Judgment reversed and cause remanded.

DRAPER V. HITT, appellant.

(43 Vt. 438.)

Promissory note — acceptance of part payment — tender.

The acceptance of a note of \$40 in satisfaction of a note of \$60, and the simultaneous surrender of the larger note, is a full discharge thereof.

A tender made subject to the condition that if the amount offered is accepted it will be in full payment of all claims, is invalid.

Draper v. Hitt.

ACTION in assumpsit by Draper against Hitt. The cause being referred the referee made the following report: .

On the 5th day of February, 1863, the plaintiff held the promissory note of the defendant, which was dated May 4, 1857, and given for the sum of \$60 and interest, and which was given on a good consideration and delivered the plaintiff on the day of its date. On the said 5th day of February, the plaintiff applied to the defendant to pay said note, but the defendant being unable to pay it, proposed to the plaintiff to give him a new note for \$40, payable in two years with interest, and in satisfaction of the note first above referred to. The plaintiff accepted said proposition, and thereupon the defendant executed and delivered the note hereto attached, when the plaintiff gave up to the defendant the said note of \$60.

On the day of the commencement of this suit, and after the writ in this cause had been served, the said defendant offered and tendered to the plaintiff, but subject to the condition that if the plaintiff took the amount so offered, it was to be in full payment of all claims of the said plaintiff, the amount of the note attached, with the accrued interest thereon up to that date, together with costs for writ and service, which the plaintiff refused to receive, claiming that his demand was more than the amount so offered him. The money thus offered the plaintiff was returned into court by the defendant, and is now in the hands of the clerk. Before me the plaintiff claimed, on the facts aforesaid, that he was entitled to recover the amount of the note first above referred to and given up by him as aforesaid; but I held otherwise, and decided and so find, on the aforesaid facts, that the plaintiff is entitled to recover the amount of the note attached with interest thereon, computed up to this 5th day of February, 1867, and amounting to \$49.60.

But if the court, upon the facts above reported, should hold and decide that the plaintiff is entitled to recover the amount of the note herein first above referred to, and given up to the defendant, then I find that the plaintiff recover of the defendant the amount of said note with interest, computed up to said 5th day of February, 1867, and amounting to \$95.10.

The court rendered a *pro forma* judgment on the report of the referee for \$95.10, and costs. Defendant excepted.

J. C. Baker, for appellant.

H. G. Wood, for appellee.

WILSON, J. The referee finds that the defendant on the 5th day of February, 1863, by agreement of the parties, executed his note of \$40, and delivered it to the plaintiff; that the plaintiff then received said note in satisfaction of a note he then held against the defendant of \$60, dated May 4, 1857, and that the plaintiff, at the time he so received the note of \$40, surrendered to the defendant the original note. The facts of this case bring it within the principle decided in the case of *Ellsworth v. Fogg & Harvey*, 35 Vt. 355. In that case the court held that the acceptance by the holder of a promissory note of part of the amount due upon it, in satisfaction and discharge of the whole note, and the surrender of the note by the holder to the maker to be canceled, is a full discharge of the note and no action can be maintained for the unpaid portion. In that case the court recognize the old decisions, that payment of part in discharge of the whole does discharge the whole, if shown by a release under seal, but if shown by a written agreement, or receipt, or any proof short of a release, it does not. The court there held that the surrender of a note, by the owner to the maker to be canceled, is equivalent to a release. In this case the note of \$40 was received by the plaintiff as payment of the note of \$60, which was surrendered to the maker. The legal effect of the accord and satisfaction, as a discharge of the original note, is the same as it would be if the \$40 had been paid in money at the time that note was surrendered.

The tender, having been made subject to the condition that if the plaintiff took the amount offered it was to be in full payment of all claims of the plaintiff, is invalid. The case does not show that the plaintiff said or did anything, at the time the tender was made, that would operate as a waiver of his right on trial to object to the conditional form in which the money was offered. The judgment of the county court is reversed, and judgment for plaintiff to recover the lesser sum reported by the referee.

Judgment of county court reversed.

Sykes v. Town of Pawlet.

SYKES v. TOWN OF PAWLET, appellant.

(43 Vt. 446.)

Highway, defects in — traveler.

Plaintiff's horse, while he was backing it out of a shed where he had left it for convenience, backed into a gulf on the side of the highway, twenty feet from the traveled track. *Held*, that plaintiff could not recover damages from the town, for that the accident did not occur in using the highway for strictly traveling purposes and that the gulf was not within the ordinary limits of the highway.

ACTION on the case by Horace Sykes against the town of Pawlet to recover for the loss of a horse and for injury to a wagon and harness in consequence of an alleged defect in a highway. The case being referred, the referee reported substantially as follows: The plaintiff (*per* his brother) went to the village of Pawlet, September 11, 1867, and drove under the shed of Franklin Hotel. He hitched his mare and went about town on business and returned. While attempting to back his mare out of the shed she became unmanageable and backed off an embankment into a stream twenty feet from the traveled track and was killed, and the wagon and harness were injured. I find that the highway near the shed was insufficient; though the insufficiency was outside of the traveled path; that ordinary care and skill was used in backing the mare, and that she was ordinarily gentle and manageable; also that propositions had been made by the town to fill up the cavity at the place of the accident. Upon this report the damages were fixed at \$294.26 and judgment *pro forma* was entered for that amount for plaintiff. Defendant excepted.

Fayette Potter and *Daniel Roberts*, for appellant.

J. B. Bromley and *A. L. Miner*, for appellee.

BARETT, J. The case being before us upon exceptions to a *pro forma* judgment of the county court, on a report of a referee, it is for this court to determine what judgment ought to be rendered. The court can regard only the facts found by the referee, as constituting the ground for such judgment.

In order to charge the town with liability for the damage sus-

tained by the plaintiff, it is necessary that it should appear that such damage was caused by the insufficiency and want of repair of the highway, as provided by our statute, as it has been construed and applied in a long series of decided cases. This case seems to present several formidable reasons why the plaintiff is not entitled to recover.

The traveled track of the highway is not complained of. The plaintiff did not meet with the accident in attempting to use it as a thoroughfare for travel. On the other hand he went on the road as far as he desired to, and then turned aside and drove under a private shed as matter of choice and convenience, to let his team stand while he was going about the village on foot, in the transaction of business. When he got ready to use his team again, he undertook to get it out of the shed with a view to getting it on the road again, but in doing this his horse backed out of the shed directly into the gulf, some twenty feet and more from the traveled track. This would seem to render the case of *Rice v. Montpelier* very much in point against his right to recover.

Again, the duty of the town in reference to the margins of highways has never been extended beyond the requirement that they should be kept in a reasonably safe condition as against such accidents as are likely to, and actually do, occur in using the highway for the purpose of travel, but it resulted from using a shed by the side of the highway, in an interval of cessation from travel, and attempting to get back into the road, after a voluntary departure from it.

Again, in order to entitle the plaintiff to recover, it should appear that the defect complained of was within the limits of the highway as located and established. This does not appear, but on the contrary, so far as the facts in this regard are shown to the court, the place of the accident was outside of the limits of the established highway. It is not to the purpose to say, that that gulf extended from the shed so near to the traveled track, and even within the limits of the highway, as to be very dangerous to persons passing on the traveled track of the highway. If the plaintiff had met with the accident from that cause, and in that manner, he would have had a case very different from his present one in this respect, but which we do not now undertake to decide, nor do we undertake to intimate what consideration we should give to it. The dangerousness of the gulf near the traveled track did not trouble him in this

Plimpton v. Farmers' Mutual Ins. Co.

instance. It was the gulf near the front of the shed, and many feet away from the traveled track.

While we should recommend to the parties entitled to control the matter to fill up that *horrible gulf*, and especially to the keeper of the Franklin Hotel to make a safer entrance and exit in front of his shed for the accommodation of his neighbors who may want a good hitching-place under cover, when they come to the village on business; still, we are clear that the town cannot be made responsible for default in this respect in this case.

Judgment reversed, and judgment for the defendant.

Plimpton, executor, appellant, v. FARMERS' MUTUAL INS. CO. *et al*

(48 Vt. 497.)

Fire insurance — execution debtor and creditor.

A. having obtained a judgment against B., levied execution upon premises owned and insured by B. Subsequently the premises were destroyed by fire. *Held*, that A. was not entitled to the proceeds of the insurance policy.

BILL in chancery. The facts appear in the opinion. The bill was dismissed below; and the orator appealed.

Waterman & Read, for appellant.

Charles N. Davenport, for appellant Mundell.

WILSON, J. The orator seeks to restrain the defendant company from paying certain insurance money to the defendant Mundell, and for decree that the same be paid to the orator.

The only question we have felt called on to decide in this case is, whether the orator has a legal or equitable claim to any portion of the money in question. It appears that Mundell, on the 5th day of November, 1866, being the owner of certain real estate occupied by him as a homestead, procured the buildings upon it to be insured by said company. About the 9th of that month the orator commenced a suit against Mundell and attached said homestead upon the writ in that suit, which was duly entered in Windham county court, and such proceedings were had therein that the

plaintiff, at the September term of said court in 1867, recovered judgment against Mundell for \$242.95 damages, and his costs taxed at \$23.36. On the 29th of February, 1868, the orator took out execution upon said judgment and caused the same to be levied upon said premises, in full satisfaction of said execution and the costs and charges thereon. In October, 1868, the buildings upon said premises were destroyed by fire. The loss was adjusted at \$381.18, including loss on personal property, of which the sum of \$190 is for the insurance on the buildings. It is insisted by the orator's counsel that the buildings were not a part of a homestead as against him in respect to said debt, and having levied upon the premises in satisfaction of the debt, he claims the insurance that was on them, on the ground of the alleged title of the plaintiff at the time of the loss.

The question whether the orator has a legal equity to the proceeds of the policy is wholly independent of the question whether the debt upon which said judgment is founded was an existing cause of action at the time of acquiring the homestead. This view of the subject renders it unnecessary to decide whether the property was exempt from said attachment and levy or not. It seems to us clear that the orator is not entitled to the whole or any part of the proceeds of said insurance. In *Lynch et al. v. Diazell et al.*, 3 Bro. P. C. 497, it is held that such insurance does not attach on the realty, or in any manner go with the same as incident thereto by any conveyance or assignment of the estate. In *Vernon v. Smith*, 5 B. & Ald. 1, the court decided that a covenant on the part of the lessee to keep the premises insured runs with the land. So, also, where the mortgagor covenanted with the mortgagee that he would keep the premises insured during the continuance of the mortgage lien, and in case of loss that the proceeds of the policy should be applied to the rebuilding of the property insured, it was held in Maryland that the mortgagee had an equitable lien upon the fund received by the mortgagor from the insurers to satisfy the balance of his debt, which he could not collect by a foreclosure and sale of the mortgaged premises. *Thoms v. Von-kapff*, 6 Gill. & J. 372. Where the insurance is effected by the mortgagee at the request of the mortgagor, a privity exists between the parties, and the premiums paid become a charge upon the mortgaged premises, in addition to and equally with the original debt, except so far as subsequent mortgagees and purchasers

Plimpton v. Farmers' Mutual Ins. Co.

are concerned, and the amount paid by the insurers to the mortgagee goes to reduce the debt of the mortgagor, who is entitled to the balance if the proceeds are more than sufficient to pay the debt. 14 Conn. 32; 7 Cush. 18. But it would seem that the mortgagee has in general no claim, either in law or equity, upon the proceeds of a policy effected by the mortgagor in his own name on the mortgaged premises, without any agreement to keep the premises insured, unless the policy be assigned to him. *Columbian Insurance Company v. Lawrence*, 10 Peters, 507; *Carter v. Washington Insurance Company*, 16 id. 504; *Carter v. Rockett*, 8 Paige Ch. 437; *Saunders v. Frost*, 5 Pick. 259. In *White v. Brown*, 2 Cush. 412, and in *King v. State Mutual Insurance Company*, 7 id. 1, the court were of opinion that an insurance on a building could not be converted into an insurance of a debt, by proof that the interest of the insured was limited to a mortgage, and that he was consequently entitled to recover the whole amount of the loss for his own benefit, without crediting it to the mortgagor. But it will be observed that the view taken in the two cases last above cited, so far as they hold the mortgagee not bound to credit the insurance money upon the mortgage debt, is at variance with that taken in *Carter v. Washington Insurance Company*, and in the case of *Smith v. The Columbia Insurance Company*, 17 Penn. 280. It is said by Mr. Ellis, in his work on insurance, page 162, that no equity attaches upon the proceeds of policies of insurance in favor of third persons, unless there be some contract or agreement or trust to that effect, and several cases are there cited in support of this view of the subject. Although in none of the cases above cited did the question arise, whether a person having acquired title by levy of execution on premises insured to the execution debtor could justly claim the proceeds of the policy in case of loss by fire, yet the general principles enunciated by those cases are entitled to great weight, so far as they are applicable to the facts of this case.

Insurance is a contract of indemnity, given by the insurer in consideration of the premium paid by the insured, against such loss or damage by fire as may happen to the insured in respect to the property covered by the policy. It is a special agreement with the person insuring against such loss or damage as he may sustain. The contract of insurance is in general confined to the parties, and as a general principle no other person has any right

in law or equity to the proceeds. Unless a legal or equitable right thereto has been created by contract with a third person, or by some act of the insured, those proceeds have become clothed with the character of real estate, or with a trust in favor of a third person. Mundell owned the premises at the time the insurance was effected. He claimed and occupied them as a homestead. He procured the insurance in his own name, for his own benefit or for the benefit of himself, his heirs and assigns, and paid the premiums from his own funds. By this precaution he has protected himself from the loss he would otherwise have sustained by the accident. The orator caused his execution to be levied upon the premises. The defendant Mundell, claiming the premises exempt from said attachment and levy, did not redeem; hence the title of the orator became absolute, if the premises were not exempt from said levy and it was regularly made. But this gave the orator no legal or equitable claim to the insurance. There was no contract or understanding between the orator and Mundell in respect to procuring said policy, and no assignment of it to the orator. The orator paid no premium for said policy, and has incurred no liability to the insurance company or for Mundell in respect to or in faith of said insurance. As to said insurance the orator stands as an entire stranger, both as to Mundell and the company. If he has or ever had any title to the premises, (a question which we have no occasion to decide) he acquired it by said levy, — a proceeding strictly *in invitum*, from which no inference can be drawn as to any agreement or understanding between him and Mundell or the company in respect to the proceeds of the policy. No privity ever existed between the orator and Mundell, or between the orator and said company, in respect to the policy or its proceeds, and there is no foundation for a trust in favor of the orator. If the orator acquired title to the premises, it became absolute before the loss, and he might have negotiated a policy for his own benefit, and have protected himself from loss; but not having done so, he took the risk and must bear the loss, and can have no recourse to the insurance, with which he had nothing whatever to do and to which he has no legal equity.

It is said by the orator's counsel that Mundell had no insurable interest in the buildings after the levy of the orator's execution became absolute; that the insurance company allowed the insurance to remain, and it belongs, says the orator, to the real owner of the

Tuthill v. Scott.

premises. Upon the facts of this case the insurance was and is a matter entirely between Mundell and said company, and does not in any way or manner concern the orator. It does not appear that Mundell has done anything to affect his title or to invalidate the insurance. It would seem that the insurers very sensibly determined that the mere fact that the orator had levied upon the homestead, and the time of redemption had expired, would not authorize the company to cancel the policy upon the assumption that the title had passed to the orator. But however this may be, the company is willing to pay the insurance money to the party or person entitled to receive it. We hold that the orator is not entitled to said money; that it justly belongs to the defendant Mundell.

The decree of the chancellor dismissing the bill is affirmed with cost to the defendants, and the cause remanded to the court of chancery, to be disposed of accordingly.

Reversed and remanded.

TUTHILL, appellant, v. SCOTT.

(42 Vt. 535.)

Adjoining proprietors — diversion of water.

A stream of water flowed in a well-defined channel across a highway and through defendant's land, until a great freshet came when it left the old channel and made a new one down the highway and flowed over plaintiff's land. Plaintiff then turned the water back to its old channel in defendant's land. Subsequently the highway surveyor, without authority, closed up the old channel and thereby caused the water to flow upon defendant's land in various places, whereupon defendant used such means to relieve his land as to cause the water to flow again in the channel formerly made by the freshet, and upon plaintiff's land. *Held*, that this was an invasion of plaintiff's rights, for which he could maintain an action without waiting for damaging effects from the water.

ACTION on the case by Tuthill against Scott, to recover for diverting a stream of water running upon lands of defendant, so as to cause it to run upon lands of plaintiff. The stream of water it appears, flowed in a well-defined channel across the highway and upon defendant's land, and until October, 1869, when a great freshet

caused it to leave the old channel and seek a new one down the road-bed, and thence upon plaintiff's land, where it was flowing to the great detriment of plaintiff, when he turned it back to its old channel upon defendant's land. Subsequently the highway surveyor, without being authorized so to do, closed up the old channel, thereby causing the water to flow upon defendant's land elsewhere to his great injury. Defendant then, in order to relieve his land, caused the water to flow in the channel formerly made by the freshet and so upon the lands of the plaintiff; for which, plaintiff now brings action. Judgment was rendered for defendant; and plaintiff excepted.

C. B. Eddy and L. S. Walker, for appellant.

A. Stoddard, for appellee.

WHEELER, J. This stream appears to have had a well-defined channel, throughout that part of its course that is material to this case, in the land of the defendant, until the time of the great freshet in 1869. At that time the water appears to have left the old channel and to have flowed over upon the land of the plaintiff in various directions, but does not appear to have made any definite channel there. The freshet caused an inundation and not a relocation, so far as his land was concerned. For this inundation the plaintiff, so far as is now shown, had no right of action against any one, because it was done by the natural action of the water. Angell on Watercourses, § 335. But he had a right to protect his land against the inundation and to prevent its continuance, if he could do so without doing any unlawful injury to any one else. As the stream had made no new channel for itself in which it could run throughout that part of its course, it was not wont to run, in that part of its course, anywhere but in the old channel. *Aqua currit et debet currere, ut currere solebat.* This was a rule of the civil law. Angell, § 93. According to this maxim, the water of this stream ought to have run in the old channel, and no one could justly complain that any one who had a right to have it run there made it run there. The plaintiff appears to have made the water of the stream to run in the old channel to relieve his land of the inundation. This, it seems, he had a right to do, and when done, the stream was as rightfully in the old channel as if it had never left it. Angell,

Tuthill v. Scott.

§ 332. REDFIELD, J., 26 Vt. 72. After the plaintiff had restored the stream to the old channel, it does not appear to have in any way run upon or into his land until the defendant filled up the channel made for it by the highway surveyor. Neither party does, or successfully could, insist that what the surveyor did to the stream, without proceedings to authorize it, in any way affected the rights of either party in respect to the other, any more than as if any stranger had done the same thing. The surveyor left the stream so that it would run on to the land of the defendant at a place where it had never run before, and where no one had any right to have it run against the will of the defendant. The defendant had the right to relieve his land, at that place, of the stream, and to use any means for that purpose that would not injure the rights of others. But he had no right to stop up the channel which led the stream to his land, to relieve that of the water of the stream, without taking such measures as would be necessary to keep it away from the plaintiff's land in that part of the course of the stream. Angell, § 335. When the defendant filled up the channel that led the stream to his land, he appears to have taken no measures to keep the water away from the plaintiff's land, but to have left it to seek its way on to the plaintiff's land as it would. What he did and omitted to do in these respects diverted the water of the stream from his own land on to the plaintiff's land, against the plaintiff's right. The plaintiff was not bound to wait, in submission to this invasion, until he had sustained some actual damage by it, before he could bring an action to vindicate the right. Should the right be made out, the invasion of it alone would be an injury from which some damage would be presumed to have accrued to the plaintiff. Sedgwick, Dam. 49; Angell, § 428; *Dickinson v. Gr. Junc. Canal Co.*, 9 E. L. & E. 513.

For these reasons the decision of the county court, by which a verdict was directed for the defendant, is considered to have been erroneous.

Judgment reversed, and cause remanded.

HARDING, appellant, v. TOWN OF TOWNSHEND.

(43 Vt. 586.)

Highway — accidental insurance — measure of damages.

In an action against a town to recover for personal injuries sustained in consequence of defects in a highway, the town is not entitled to have the proceeds of an accident insurance policy of plaintiff deducted from the amount of damages.

ACTION on the case by Harding against the town of Townshend, to recover for injuries received by reason of the insufficiency of a highway, which defendant was legally bound to keep in repair. At the trial the court allowed the proceeds of an accident insurance policy of plaintiff (\$128) to be deducted from the amount of damages. Plaintiff excepted.

H. E. Stoughton, for appellant.

A. Stoddard, for appellee, argued that the plaintiff was entitled to be indemnified but once, and cited *Chamberlain et al. v. Murphy et al.*, 41 Vt. 110; *Bird v. Randall*, 3 Burr. 44-6; *Yates v. Whyte*, 4 Bing. N. C. 272 (33 E. C. L. 349); *Hicks v. Abergavenny & Hereford R. R.*, 4 Best and Smith, 408; *Sedgwick on Damages*, 5th ed. 646, note.

PERC, J. There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract or otherwise. It cannot be said that the

Harding v. Town of Townshend.

plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit.

But it is urged on the part of the defense, that the plaintiff is entitled to but one satisfaction for the injury he has sustained. If we assume this to be a correct proposition, the question arises whether the defendant stands in a condition to make this objection. This depends on the question who, as between the insurer and the defendant, ought to pay the damage—which of the two ought primarily to make compensation to the plaintiff and ultimately to bear the loss? If the insurer ought ultimately to bear the loss, the defendant is entitled in this action to have the benefit of that payment; but if the defendant should ultimately bear the loss, then the payment by the insurer and the collection of the entire damage of the defendant only creates an equity between the plaintiff and the insurer, to be ultimately adjusted between them, in which the defendant has no interest, and with which he has no concern. The statute imposes upon the towns severally the duty of keeping their highways in good and sufficient repair, and makes each town liable for any special damage happening to any person by reason of the insufficiency or want of repair of any highway in such town. The defendant is found liable in consequence of the breach of this duty. The defendant town, therefore, in respect to the injury the plaintiff has sustained, is the wrong-doer; and whether such by some positive, affirmative act, or by culpable negligence, does not vary the principle applicable to the case. In such case, as between the insurer and the wrong-doer, in reason and justice the burden of making compensation to the injured party ought to be ultimately borne by the party thus in fault. The party whose wrongful act or culpable negligence caused the injury ought to make compensation and bear the loss. Therefore, if there is any such connection between these two remedies as to have the enforcement of one operate in defense or mitigation of the other, it is the insurer, and not the town, that should be entitled to this benefit. It would seem to be a perversion of justice to subrogate the wrong-doer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer. But it is not uncommon that the insurer, who has paid the loss, is put in place of the insured and subrogated to his rights in respect to his remedies against

others for the injury. *Randal v. Cockran*, 1 Ves. Sr. 98, is an instance of the application of this principle in equity.

In principle the question involved in this case has been settled in analogous cases. In *Mason v. Sainsbury*, 3 Doug. 61, it was held that in an action against the Hundred under stat. Geo. I, to recover for the destruction of the plaintiff's house by a mob, the fact that the plaintiff had received the amount of his loss from the insurer would not avail the defendant in defense. In that case it appeared that the action was prosecuted for the benefit of the insurer; but it establishes the principle that the right of the insurer is paramount to that of the wrong-doer, or one in place of the wrong-doer. So in *Clark v. The Inhabitants of the Hundred of Blything*, 2 B. & C. 254 (9 E. Com. L. 77), it was decided that the owner of certain stacks of hay and corn which were maliciously set on fire, who had received the amount of his loss from an insurance office, could nevertheless recover the amount in an action against the Hundred under the stat. Geo. I. In the case at bar, the town is certainly no less to be regarded as in fault for the insufficiency of its highways, than the Hundred for crimes committed by individuals within its limits. In *Yates v. Whyte and others*, 33 E. Com. L. R. 349 (4 Bing. New Cases, 272), in an action for damage to plaintiff's ship by collision with defendant's ship, it was held defendant was not entitled to deduct from the amount of damages a sum paid to plaintiff by insurers in respect to such damage. The same decision was made in a similar case of collision of vessels, *The Propeller Monticello v. Gilbert Mollison, in Admiralty*, 17 How. (U.S.) 152. In that case there had been an abandonment to the insurers and an acceptance of the abandonment by the insurers, who had paid the insurance prior to the filing of the libel; and GRIER says that the doctrine, that in such case the fact that the injured party has received satisfaction from insurers cannot avail the defendant, is well settled at common law, and received in courts of admiralty. We are referred by defendant's counsel to *Bird v. Randall*, 3 Burr. 1345, in support of the proposition that the defendant can avail himself of such payment. But in that case the plaintiff, having sued and collected of the servant the full stipulated penalty as damages for permanently abandoning his service, it was held that the plaintiff could not afterwards recover of the defendant for procuring or enticing the servant thus to abandon his master's service. In that case the servant and defendant were both wrong-doers, and in

Harding v. Town of Townshend.

principle stood in the relation of joint tortfeasors, and hence the one who did the act that caused the injury having made full satisfaction therefor, the other could not be held liable for the same injury for having aided in procuring the servant to do the wrongful act. The only case which I find, which seems to favor the application of the insurance money in reduction of the damages, is what is said in a note to *Pym, Admr., v. The Great Northern Railway Co.*, 4 B. & S. 396 (116 E. C. L. R. 396), decided in 1861, in the Exchequer Chamber, on appeal from the decision of the court of queen's bench. It was an action upon 9 and 10 Vict. ch. 93, by the plaintiff as the widow and administratrix of her husband, to recover for the pecuniary loss to herself and his children from his death caused by the negligence of the defendant. The right to deduct insurance money from the damages was not involved in that case; but it seems from what is said in that case by the defendant's counsel, in reply to a question by POLLOCK, C. B., that there was no case under that statute where, in estimating the damages, notice had been taken of life insurances left behind by the deceased, except an unreported case at *nisi prius*, *Hicks v. The Newport, Abergavenny & Hereford Railway Co.*, in which it is said by defendant's counsel that Lord CAMPBELL held that in such action upon that statute a deduction should be made from the damages on account of such insurance; and in a note is stated what purports to be the charge of Lord CAMPBELL to the jury in that case, in 1857, directing them to deduct a sum received on an insurance against accidents by railways, and allowing them, if they thought proper, to make a deduction on account of other insurances on the life of the deceased. The facts are not stated otherwise than as they may be inferred from what is given of the charge. If this *nisi prius* case is not distinguishable from the cases above referred to, it cannot be regarded as of equal authority; nor can we regard it as controlling the decision of the case at bar. But there is a distinction between that case under the English statute, and the case at bar and other cases referred to. Under that English statute the action is not brought by the deceased, the party upon whom the injury was directly inflicted, nor is the recovery for the same cause of action that the deceased would have had, had he survived; but the statute gives a new cause of action based on a different principle. The recovery is not for the damages which the deceased might have recovered had he survived, but is solely for the pecuniary loss the

 Stoddard v. Locke.

persons for whose benefit the action is brought, "*the wife, husband, parent and child of the person whose death shall have been so caused,*" sustain by such death. In such case, in estimating the pecuniary loss to the family which they have sustained by the death of the father, it might be less objectionable to take into consideration an insurance on his life which he left for their special benefit, *not procured by them or at their expense*, than to give the defendant the benefit of the insurance in the case at bar. But still, if to be considered at all, it is more reasonable to hold that the superior equity is in the insurers who pay the loss. And in *Althorf, Admr., v. Wolfe*, 8 Smith, 355, it appears to be regarded as settled by the court of appeals that under the New York statute, which is in substance like the English statute above mentioned, the fact that the widow received an amount insured on the life of her husband for the benefit of the wife, cannot be taken in reduction of damages recoverable under the statute for her benefit. This seems to be the more reasonable doctrine, and most in harmony with principles established by the decided cases.

Judgment of the county court reversed, and judgment for the plaintiff for the amount of the verdict, and the \$123 to be added thereto.

Judgment of county court reversed.

STODDARD, appellant, v. LOCKE *et al.*

(43 Vt. 574.)

Discharge in bankruptcy — attachment — decree in rem.

A discharge in bankruptcy will not prevent a creditor from taking a decree *in rem* against a fund upon which he obtained a lien, by trustee attachment, more than four months prior to the commencement of the proceedings in bankruptcy.

BILL in chancery by Stoddard against Locke *et al.* The material facts in this case are as follows: In 1864 the orator recovered judgment against the defendant, James L. Locke, for \$635.77 and costs. This judgment has never been paid. The orator, in June, 1865, sued the judgment, and summoned, as Locke's trustees, Charles R. Brown, John E. Butler, and William A. Carr. The

Stoddard v. Locke.

fund which the orator sought to attach and hold by that trustee process arose from a certain note of about \$650, in favor of Locke's wife, against said Brown. This note, the orator insisted, and in this upon the trial he proves correct, was in fact Locke's property and not the property of his wife. At the time the trustee process was served, the note was in Butler's hands, and he had commenced a suit against Brown upon it in his own name, and had attached a quantity of Brown's personal property, which property had been sold, according to the statute, upon the writ before judgment, by said Carr, a deputy sheriff, and the funds arising from the sale, about \$650, were in Carr's hands at the time the trustee process was served, and no judgment had been rendered in favor of Butler. The orator brought this bill in equity in aid of his suit at law, at the September term, 1867. Butler, by leave of the court of chancery, took judgment in his suit on the note, against Brown, but the fund arising from said sale was at the same time transferred to the court of chancery, and invested under the direction of that court, to be ultimately disposed of according to the liens and rights of the respective parties. It turns out that Butler had such an interest in the note as to entitle his administrator to hold all of said fund except \$400, and interest since October 1st, 1869. For this \$400 and interest the orator would be entitled to a decree, so far as any facts are concerned which existed at the time the trustee process was served, in June, 1865. It appears, however, that in September, 1867, the said Locke commenced proceedings in the United States district court, which resulted in his receiving, on the third day of November, 1868, a certificate of discharge in bankruptcy from all debts and claims provable against his estate, and which existed on the thirteenth day of September, A. D. 1867, on which day the petition for adjudication was filed by him, except such debts, if any, as by said act are excepted from the operation of a discharge in bankruptcy. This discharge Locke, on the ninth of September, 1869, pleaded in bar of the relief sought by the orator in his bill. The orator thereupon filed his written proposal to take a decree only against said note or its avails, and not against any other property, nor against the person of said Locke.

The bill was dismissed with costs. The orator appealed.

C. B. Eddy, for appellant.

Waterman & Read, for appellee.

STEELE, J. (after stating facts). The question left for adjudication is, whether the discharge in bankruptcy will prevent the orator taking a decree *in rem* against the said fund upon which he obtained a lien by trustee attachment more than four months prior to the commencement of the proceedings in bankruptcy. By the fourteenth section of the bankrupt act of 1867, it is provided that the assignment shall dissolve any attachment on *mesne process* "made within four months next preceding the commencement of said proceedings." The irresistible inference is, that it does not dissolve such attachments when made more than four months prior to the institution of the proceedings. This construction is aided by the provision of the twentieth section, recognizing the validity of "liens" upon the bankrupt's estate for securing the payment of a debt. Especially is this so when we remember that this act was passed in view of the decisions upon the bankrupt act of 1841, under which it was conclusively settled in the supreme court of the United States, after a somewhat famous controversy, in which Judge PARKER and the supreme court of New Hampshire of the one part, and Judge STORY of the other, held opposing views, that an attachment upon *mesne process* was a *lien*, and *such a lien* as could be enforced in a State court, notwithstanding the bankruptcy proceedings, by a qualified judgment, limited in its operation to the property attached, and not to be enforced against the other property, or the person of the bankrupt. *Peck v. Jenness*, 7 How. (U. S.) 61; (17 Curtis, 320); *Kittredge v. Warren*, 14 N. H. 509; *Kittredge v. Emerson*, 15 id. 227; *Ex parte Reed*, 21 Vt. 635. But see *ex parte Bellows*, 3 Story, 428. There would seem to be no sound reason why a qualified judgment or decree by the State court, to enforce the lien created by the attachment, should be more objectionable under this act than it was under the act of 1841. By the provision of both acts, the general property in the estate attached passes to the assignee subject to the attachment. By the provision of both acts the discharge in bankruptcy protects the bankrupt's person, and other property not under a lien, from molestation on account of prior debts. The decree asked for in this case is simply a decree against the property, to make available the lien upon it created by the State law and recognized by the act of Congress as valid. The other sections of the statute should not be so construed as to prevent the enforcement of a lien which the fourteenth section expressly permits. *Bates v. Tappan*, 99 Mass. 376.

Batchelder v. Low.

The decree is for the orator to have and receive out of the said fund the sum of \$400, and interest which may have accrued thereon since October 1st, 1869. This decree not to be enforced against the person or other property of the defendant James L. Locke. The remainder of said fund to be disposed of according to the stipulation of the parties.

Decree reversed.

BATCHELDER, Administrator, appellant, v. Low.

(42 Vt. 602.)

Discharge in bankruptcy — plea in bar — collateral proceeding.

A discharge in bankruptcy, obtained after the commencement of an action on a promissory note provable as a debt under the bankrupt act, when pleaded in bar of such action, may be attacked therein by showing that it was obtained upon proceedings of which the plaintiff was fraudulently deprived of notice.

ACTION in assumpsit upon a promissory note signed by defendant and payable to Betsey Ayer, or order. The plaintiff is administrator of the payee. The defendant pleaded his discharge in bankruptcy, since the commencement of this suit, in bar of the action. The plaintiff replied that defendant fraudulently omitted the note in question from his schedule of debts, and also fraudulently omitted certain property from his schedule of assets. It was admitted that the note was provable under the bankrupt act; and the court ruled that the discharge could only be attacked in a proceeding to set it aside in the United States court.

Verdict for defendant; plaintiff excepted.

Dickey & Gambell and *C. W. Clark*, for appellant.

R. Farnham, for appellee.

WHEELER, J. From the recitals in the pleadings and the course of the argument, it is understood that the bankruptcy of the defendant was voluntary, and that the proceedings were had upon his own petition. He must have commenced the proceeding for the purpose of obtaining a discharge from such debts that he owed as were provable against his estate. He could not do this without giving

up such property that he had as could be reached for them. He could not accomplish the whole without procuring two judicial determinations. One, that he was a bankrupt, whereupon his property would pass to an assignee for the benefit of the creditors. The other, that he was discharged from provable debts. The judgment of discharge was most important to him, because that alone would relieve him from further personal liability. It was also important to the creditors, for it would cut off their claims to the same extent that it would relieve him from them. This judgment was between him and them, and all of them would be proper parties to it. It is a fundamental principle, in relation to judicial proceedings, that all persons between whom such a proceeding is pending must have proper notice of it, and an opportunity to be heard in it before any judgment can be rendered upon it that will bind them. The bankrupt act recognizes this rule of law, and, in accordance with it, requires the bankrupt to annex a schedule of the debts he owes, and the names of the persons to whom due, to his petition, and that personal notice shall issue out of the court of bankruptcy to each creditor named in the schedule. The schedule is the sole foundation for personal notice of the proceedings, at any stage of them, to creditors who are not already parties. Special notice of the application for a discharge, to creditors who have proved their claims, is required. But those having no notice of the proceedings would have no opportunity to prove their claims, and not having proved them, would not be served with this notice. No other notice of the application, except by publication, is provided. The defendant, therefore, by the schedule annexed to his petition and sworn to by him, furnished the only basis for personal notice direct to the creditors against whom he was proceeding to obtain this judgment of discharge. If he omitted this note and the name of the person to whom it was nominally, and the names of the persons to whom it was really due, he kept the foundation for notice of the proceedings, to those persons, away from the court of bankruptcy. If he did that fraudulently, and by that means they failed to receive notice, as in the replication is alleged, then he fraudulently deprived them of the notice of, and of the opportunity to be heard upon, the proceedings, which they were entitled to, and would have had, if he had made an honest schedule. An ordinary judgment, obtained by such fraud would be wholly invalid everywhere as against the party imposed upon. This is not an ordinary judgment, and it might not be

vitiated as to any party by a mere want of notice to him without any fault in that respect on the part of the person procuring it. As to that, however, no decision is now made or opinion expressed. But, although peculiar in form and effect, it is an adjudication upon proceedings of which all parties interested should have all the notice which the law provides for them. And when the party procuring it fraudulently deprives such parties of all the direct notice that the law entitles them to, and proceeds to judgment without such notice to them, the judgment, such as it is, although it may be valid as to all persons who had notice, should be void as to those who did not. And if this defendant procured this judgment of discharge, as is alleged in the replication, it should be and is invalid as to the nominal and real plaintiffs. The right of the plaintiffs to compel payment of this note by suit is a common-law right. When they commenced this suit, it was a proper proceeding to enforce their right. According to common principles, all questions concerning the validity of this discharge as against the plaintiffs with reference to this note should be settled in it with the other questions, unless the bankrupt act prevents.

That act provides a way for setting aside the discharge altogether, as to all persons; but furnishes none for setting it aside as to some, and leaving it valid as to other persons. The fraud upon these plaintiffs did not injure the creditors who proved their claims. It probably benefited them by keeping out the plaintiffs' claim from those upon which the estate was to be divided, and so lessening the amount of them and increasing the dividend upon them. So they have no just ground to complain on account of it. They became parties to the proceedings, and may have known of the omissions from the schedules before the discharge was granted. If so, they probably have no legal claim to have the discharge set aside on account of the omissions. The discharge, therefore, may be justly and legally valid as to other creditors and invalid as to the plaintiffs. If it is so, then the provision in the act for setting it aside altogether should not prevent the plaintiffs from showing that it is invalid as to them anywhere where the other creditors are not concerned. This provision in the act does not directly, and does not seem to impliedly, prohibit inquiry into the validity of this discharge for this cause in this suit.

The provision in the act that the discharge may be pleaded as a full and complete bar, does not show that matter which would

invalidate the discharge might not be replied to the plea. The discharge is to be pleaded in suits upon the claims in the courts where pending, and those courts must, to some extent, determine the validity and effect of the pleas. No other court could consider them and render any judgment upon them in those cases. The provision in the same section, that the certificate shall be conclusive evidence of the fact and regularity of the discharge, seems to relate to the mode of proof of the discharge, and not to the effect of it when proved. Without this provision, proof of all the proceedings upon which the discharge is founded, by records or copies, would probably be necessary to make out the fact and regularity of it before a court. This provision substitutes the certificate of discharge for this proof, and declares it shall have the same effect. These provisions concerning the pleading, proof and effect of a discharge are some like those in the constitution and laws of the United States concerning the proof and effect of the public acts, records and judicial proceedings of each State in the other States. It seems to be well settled that those provisions do not prevent inquiry into the validity of any judgment for want of notice, or on account of fraud in procuring it, wherever it is sought to be enforced. This construction was settled long before the bankrupt act was passed, and must have been well known to the framers of that act. If they had intended that these provisions of that act should receive a different construction, they probably would have used language that would have expressed their intention clearly. A similar construction of these provisions seems more just and more consistent with well settled principles than one which would make the discharge conclusive as to all persons everywhere until set aside by the court which granted it. These are all the provisions of the act that appear to relate to this question. As now understood they do not prevent the plaintiffs from contesting the validity of this discharge as to them in this suit by alleging and showing that it was obtained upon proceedings of which they were fraudulently deprived of notice.

The omission from the schedule of assignable estate, concealment of it from the assignee and creditors, and appropriation of it by the defendant to his own use, would not injuriously affect the rights of the plaintiffs as now involved in this suit. Those things did not deprive the plaintiffs of notice of the proceedings of any opportunity to be heard in them. They would lessen the amount of the estate

 Davis v. Munson.

to be divided among the creditors who proved their claims, and would be a fraud upon the rights of those creditors. But they would not prevent the court of bankruptcy from acquiring jurisdiction of any person nor take the jurisdiction away, or make the exercise of it invalid when acquired. That court had jurisdiction of the defendant and of his assignable estate and of the creditors who were made or became parties to the proceedings in bankruptcy, so far as those proceedings extended. And if any of that estate was fraudulently concealed and not reached for the benefit of the creditors, it could correct the fraud and dispose of the property for the benefit of those entitled to it, and its proceedings in that respect would be conclusive upon all persons, probably. It does not now seem that any conduct of the bankrupt with reference to that property over which that court had jurisdiction, which belongs to persons over which that court also had jurisdiction, should be inquired into anywhere except in that jurisdiction.

The county court having directed a verdict for the defendant, notwithstanding the allegation of the plaintiffs that they were fraudulently deprived of notice of the proceedings in bankruptcy by the defendant, and the proof tending to support it, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

DAVIS v. MUNSON, appellant.

(43 Vt. 576.)

Sheriff — reward for capturing criminals.

Plaintiff, a sheriff, captured a criminal without process and in reliance upon a general reward offered. *Held*, that the fact that he was a sheriff, did not prevent his recovery of the reward.

ACTION in assumpsit by Anson Davis against William D. Munson to recover a reward offered by defendant for the capture of two criminals. The facts appear in the opinion.

Verdict for plaintiff; defendant excepted.

Wales & Taft, H. Ballard and B. F. Fifield, for appellant.

Heaton & Reed, Randall & Durant, for appellee.

STEELE, J. Three persons in the Chittenden county jail broke from their confinement and escaped into Washington county. Immediately after their escape, the defendant, who was the sheriff of Chittenden county, advertised a general offer of a reward of \$100, for the capture of each prisoner. In reliance upon this offer the plaintiff went in search of them and succeeded in capturing two of the number, which would entitle him to recover of defendant \$200, unless the fact that he was at that time a deputy sheriff in Washington county disentitles him to the reward.

Upon the facts as detailed, the plaintiff had authority to arrest these prisoners without process and as a peace officer. It would, in a general sense, have been his duty to do so if they had been pointed out to him under circumstances to assure him of their identity and to lead him to apprehend reasonable danger of losing them if he waited for process. But the fact that he had this authority and was under this general duty did not put him, having no process in his hand, under any specific official obligation to look them up. There is no provision of law which requires him to do so, or provides fees for his service in so doing. If on making search for them he had been unsuccessful, he would have been entitled to no compensation either from the defendant or the State. Even if successful, he would have had no legal claim against the State, whether entitled to a reward from the defendant or not. The most that can be said is that the legislature, in their discretion, usually provides by special act for the compensation of officers for such service, when successful, if rendered without reward from others.

The plaintiff being under no specific official obligation to enter upon the detective service for which he would not be legally entitled to pay from the State, he is clearly a person who might engage in it in reliance upon the offer of this reward, unless the service was inconsistent with his official relations. So far from being inconsistent with them, it was specially appropriate to them. To hold that the plaintiff could not recover, would be to exclude peace officers from compensation for detective criminal service, unless employed by the State. This, we think, would be very unreasonable and impolitic. These views do not conflict with the case of *Brown v. Godfrey*, 33 Vt. 120. In that case the officer held process against Lackey and he was bound to execute it. His services in this State were chargeable as fees upon that process. He was therefore allowed to recover of the defendant for such only of his services as

Davis v. Munson.

were outside the State, and therefore not under command of his process. The case is also broadly distinguished from *Pool v. Boston*, 5 Cush. 219. The plaintiff in that case was a watchman, employed by the city of Boston. While engaged in the performance of his regular duties under his engagement with the city as watchman, he discovered and arrested an incendiary setting fire to a house. He then claimed a reward of \$2,000 which the city had offered for the detection and conviction of any incendiary. The plaintiff having done what he was hired and paid to do, independent of the reward, the court properly held that he could not recover. This case would be like that one, if the plaintiff had been employed by the defendant for a fixed compensation by the day to search for these prisoners. If he had thus agreed beforehand upon a fee for his services, he would of course have been limited to a recovery of the stipulated compensation. His time and skill used in detecting the criminals would, under such circumstances, have been the property of his employer, and not his own, and therefore could not be the basis of a claim against his employer.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**BEATTY, appellant and respondent, v. THE LYCOMING COUNTY
MUTUAL INSURANCE COMPANY.**

(88 Penn. 2.)

Fire insurance — policy — notice and statement of loss — waiver.

It is a sufficient compliance with a condition in a policy of fire insurance requiring that, in case of loss, "the insured shall forthwith give notice thereof to the secretary," where a sworn statement of the fact and circumstances of the fire, signed by the assured the morning after the fire, was forwarded, on the following day, by the agent, to the secretary of the company. It is not a sufficient compliance with a condition in a policy of fire insurance, on "household furniture \$367" and "groceries \$238," requiring that, in case of loss, "the insured shall * * * * within thirty days deliver to the secretary a particular account" of the loss, where the statement sent by the insured is a mere reiteration of the description in the policy: "household furniture. \$367," and "groceries \$238;" and the fact that the company received such a statement at the end of twenty days, but gave no notice of insufficiency is not a waiver of the condition demanding a "particular" statement.

ACTION on two policies of insurance by Daniel Beatty against the Lycoming County Mutual Insurance Company. The policies are as follows: No. 37,775, dated July 29, 1854, insuring \$600, viz.: on "household furniture" \$367, and on "groceries" \$233; No. 41,140, dated May 1, 1855, insuring \$600 on a frame dwelling-house. Each policy contained the condition, that in case of fire

Beatty v. The Lycoming County Mutual Insurance Company.

"the insured shall forthwith give notice thereof to the secretary, and within thirty days after said loss shall deliver to the secretary a particular account of such loss or damage, signed by his or her or their own hand or hands, or by their guardian, attorney or agent." A loss by fire occurred on the 31st day of August, 1858, and the next morning the local agent of the company, in company with counsel, visited the premises and made an examination of the circumstances attending the fire. The insured was examined under oath and his testimony was reduced to writing, signed by him, and, the following day, sent by the agent to the secretary of the company. On the 20th of September, the insured sent the following notice to the secretary of the company:

"One frame house, insured in the Lycoming County Mutual Insurance Company, etc., was, on the 31st day of August, 1858, completely destroyed by fire and entirely lost.

"You are also hereby notified that, at the same time and place, the household furniture and groceries of the undersigned, insured by policy of insurance, dated the 29th day of July, 1854, and numbered 87,775, as follows, viz., household furniture, \$367, groceries, \$233, making together the sum of \$600, were also lost and destroyed by fire aforesaid; the whole property of undersigned in the house at the time being destroyed, with the exception only of a few articles of household furniture.

"You will take notice further, that the said the Lycoming County Mutual Insurance Company will be looked to by me for payment in full of the amount and sum insured by the policies aforesaid, and payment in full hereof will be required and demanded from them.

"DANIEL BEATTY.

"Duncansville, Blair Co., Pa."

No notice of insufficiency in the statement was given to the insured before the expiration of the "thirty days" mentioned in the policy. Under the instructions of the court, the insured recovered on the policy on the dwelling-house, but not on that on the furniture and groceries. The points made by counsel and the rulings of the court are stated sufficiently in the opinion. Both parties appealed.

S. S. Blair, for Beatty, argued that the condition as to notice should be construed liberally, and cited *Bartlett v. Union Ins. Co.*, 46 Maine, 500; *Walsh v. Washington Ins. Co.*, 32 N. Y. 427. Whether the account Beatty gave was as particular as the nature of the case allowed, was for the jury. *Franklin Fire Ins. Co. v. Updegraff*, 7 Wright, 350. Whether the condition was waived, was for the jury. *Inland Ins. Co. v. Stauffer*, 9 Casey, 402; *Trylos v.*

Beatty v. The Lycoming County Mutual Insurance Company.

Merchants' Ins. Co., 9 How. (U. S.) 390; *Lycoming Ins. Co. v. Schreffler*, 6 Wright, 188; *West Branch Ins. Co. v. Helfenstein*, 4 id. 290; *Francis v. Ocean Ins. Co.*, 6 Cowen, 404; *Allegre v. Maryland Ins. Co.*, 6 Harris & Johnson, 408; *Aetna Fire Ins. Co. v. Tyler*, 16 Wendell, 385; *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosworth, 495; *Hall v. The Insurance Co.*, 3 Phila. R. 332; *Child v. The Ins. Co.*, 3 Sandf. 26; *Kernochan v. The New York Bowery Ins. Co.*, 17 N. Y. 428.

L. W. Hall and *S. Calvin* (with whom was *D. J. Neff*), for the Insurance Company, cited *Dishl v. Adams Co. Mutual Ins. Co.*, 8 P. F. Smith, 452; *Mitchell v. Lycoming Ins. Co.*, 1 id. 402; *Lycoming Mutual Ins. Co. v. Updegraff*, 4 Wright, 312; *Same v. Schreffler*, *supra*.

SHARSWOOD, J. Daniel Beatty prosecuted in the court below an action of covenant against the Lycoming County Mutual Insurance Company, to recover for losses by fire on two policies of insurance, one covering his household furniture and groceries, and the other his dwelling-house. Under the charge of the learned judge below he recovered a verdict upon the policy on the dwelling-house, but the jury gave him nothing for his household furniture and groceries. Both parties have sued out writs of error to the judgment.

There are several assignments of error, but all may be disposed of by the resolution of three questions, arising upon the application of an article or condition of each policy requiring that in the case of a loss the insured shall forthwith give notice thereof to the secretary, and within thirty days of the fire a particular account of such loss or damage, signed, etc.

The three errors assigned by the insurance company relate to the first question. The learned judge instructed the jury that there was sufficient evidence of notice forthwith given by the assured of the occurrence of the fire, to fulfill the requirement of the policies in that respect. It appears that the fire occurred August 31, 1858, and that the morning after, the local agent of the company, in company with counsel, visited the premises and made an examination of the circumstances attending it. Daniel Beatty, the insured, was himself examined as a witness under oath, his testimony or statement reduced to writing and signed by him. It was forwarded by

Beatty v. The Lycoming County Mutual Insurance Company.

the agent to the secretary of the insurance company on the following day, and was received by him. We think the learned judge was perfectly right in holding this a sufficient notice of the loss within the terms of the policy. It was held in *The West Branch Insurance Company v. Helfenstein*, 4 Wright, 289, in cases in which the policy contained a condition expressed in the same words as this, that a written notice to the secretary from the local agent, upon information conveyed to him by the assured, is sufficient. There is nothing to prevent the assured from constituting the agent of the company his attorney to give the notice, and if he does not give the notice accordingly, the company cannot object without a rule or condition prohibiting the agent from being employed for such purpose. But this case is stronger than that. The statement of the fact and circumstances of the fire was signed by the assured himself, and transmitted through the local agent to the secretary of the company. How it reached the proper destination is entirely immaterial, provided it was forwarded in due and reasonable time, which in this instance is not denied. This disposes of the writ of error of the insurance company.

The second question which is raised by the first assignment of error of the plaintiff below is, whether there was any evidence of such a particular statement of the loss under the policy upon household furniture and groceries as was required by its terms. The learned judge instructed the jury that there was not. The plaintiff maintains that the sufficiency of the statement was for the jury, upon the authority of *The Franklin Insurance Company v. Updegraff*, 7 Wright, 350. The report of that case does not furnish us with the statement. It is said in the charge of the court below to have been general, not particular; that it did not specify the different articles consumed. We must assume, however, that some information was given of the character and extent of the loss. It was then for the jury to say whether it was as particular as it should have been. But in this case there was no statement at all. The paper given in evidence as such is a mere reiteration of the description in the policy, namely: "household furniture, \$367; groceries, \$233, making together the sum of \$600, were also lost and destroyed by fire aforesaid, the whole property of undersigned in the house at the time being destroyed, with the exception only of a few articles of household furniture." It is certainly not necessary in every case to report all the items in detail which constitute

Beatty v. The Lycoming County Mutual Insurance Company.

the loss. It may be entirely out of the power of the assured to do so. His books and papers may have been destroyed by the fire. But every person assured must be presumed to know enough to be able to remember some particulars, or to give a description if it do not descend to details of the different kinds and value of the articles. There are few men who, with assistance of the members of their family, could not give some description of their household furniture. In *The Lycoming County Insurance Company v. Updegraff*, 4 Wright, 311, an instruction to the jury that a statement of this character was not such a particular account of the loss as was required by the policy, was approved and affirmed by this court. This assignment of error, therefore, is not sustained.

The only remaining question which is raised by the plaintiffs' second assignment is, whether there was any evidence of waiver by the company of the condition requiring a particular statement. The learned judge held that there was not, and we think rightly. It was required to be within thirty days after the fire. Now to constitute a waiver there should be shown some official act or declaration by the company during the currency of the time, dispensing with it; something from which the assured might reasonably infer that the underwriters did not mean to insist upon it. As is remarked by the present chief justice in *Diehl v. Adams County Insurance Company*, 8 P. F. Smith, 452, "this never occurs unless intended or where the act relied on ought in equity to estop the party from denying it." Mere silence is not enough. After the thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract. Had a statement been furnished, within the time it might have been the duty of the insurers to notify the assured of any merely formal defect so that it might be remedied. If the paper dated September 20th, 1858, was to be regarded as a statement and not a mere notice of the loss, the defects of it were substantial, not formal merely. The case of *The Inland Insurance Company v. Stauffer*, 9 Casey, 397, was where a notice of loss was given to a director and not to the secretary. A few days afterward the president of the company and another director came out to view the ruins, meeting there committees from other insurance companies and avowing that they came on the business of the insurers. These facts it was held might be submitted with others to the jury as evidence of a waiver of a strict and formal compliance with the

Elliott v. Lycoming County Mutual Insurance Company.

condition. That case is in none of its circumstances parallel with this. The second assignment of error of the plaintiff is therefore not sustained.

Judgment affirmed.

ELLIOTT, appellant, v. LYCOMING COUNTY MUTUAL INSURANCE COMPANY.

(66 Penn. 22.)

Fire insurance — over insurance — waiver — part payment, effect of.

A policy of fire insurance upon buildings contained a stipulation, "that the aggregate amount insured in this and other companies * * * shall not exceed two-thirds of the estimated cash value." The insurance was for \$1,800, and the estimated cash value, according to the policy, was \$1,950; subsequently improvements were made and an additional insurance of \$1,000 was effected in another company. The buildings were destroyed by fire; and their value at the time of the fire was \$4,200. In an action on the first policy, *held*, that the "estimated cash value" was, that at the time of the first insurance; and that the first policy was void for over-insurance.

Where an insurance company, after notice or knowledge of over-insurance, makes and collects assessments under the policy upon the assured, a forfeiture for over-insurance is thereby waived, but where an assessment is made by the agent of the company, by mistake, but is not collected and is never paid, this does not constitute a waiver of the forfeiture.

Where a policy of fire insurance is issued upon a house and stable; and an over-insurance is made upon the house, a tender of the amount insured on the stable, in case of loss by fire, is not an affirmation of the insurance as to the house so as to preclude the company from setting up a forfeiture.

ACTION on a policy of fire insurance, by Elliott against the Lycoming County Mutual Insurance Company. The policy in suit was issued July 11, 1864, on a house and stable (known as the "Dougherty House"), for \$1,300, estimated cash value \$1,950. The policy contained a stipulation, "that the aggregate amount insured in this and other companies, on the above mentioned property, shall not exceed two-thirds of the estimated cash value." It appeared that in 1865, plaintiff had made repairs and additions to the house, considerably increasing its value. The agent of defendants then visited the premises and made his certificate, stating that, in his judgment, the alterations did not increase the risk. On the 2d of March 1866, the plaintiff procured an additional insur-

Elliott v. Lycoming County Mutual Insurance Company.

ance for \$1,000 on the house, in the North American Insurance Company, and on the fourteenth of the same month the buildings were destroyed by fire. The buildings were valued at \$4,200. An assessment was made by defendants upon plaintiff in January, 1865, for \$585; and another in May, 1866 (after the fire), for \$780. The duplicate of the latter assessment was forwarded to the agent on the 8th of May; and on the following day he received a letter directing him not to collect it. The agent inadvertently made the demand upon plaintiff, however, but recollecting himself (by looking at his memorandum) he went away without pressing the demand, which, was never paid. Defendants tendered the amount of damage on the stable, which, being refused, they paid into court.

Judgment for plaintiff for the amount of damage on the stable only. Plaintiff appealed.

D. J. Neff and *L. W. Hall*, for appellant, cited *Coursin v. The Penn. Ins. Co.*, 10 Wright, 323; *The Cumberland Mut. Prot. Co. v. Mitchell*, 12 Wright, 374; *Lycoming County Mutual Insurance Company v. Schollenberger*, 8 id. 259; *Same v. Stocklorn*, 3 Grant's Cases, 207.

S. M. Woodcock and *Scott*, for appellee, cited *Mitchell v. Lycoming Ins. Co.*, 1 P. F. Smith, 402; *Ins. Co. v. Stockbower*, 2 Casey, 199; *Cooper v. Farmers' Mutual Ins. Co.*, 14 Wright, 299; *Angell Ins.* 253 and note; *Ogden v. Ash*, 1 Dallas, 164.

SHARSWOOD, J. It was decided in *The Insurance Company v. Stockbower*, 2 Casey, 199, that when a policy of insurance provides "that the aggregate amount insured in this and other companies, on the above-mentioned property, shall not exceed two-thirds of the estimated cash value," any further insurance being in violation of the agreement renders the policy void. To the same effect is *Mitchell v. The Lycoming Mutual Insurance Company*, 1 P. F. Smith, 402. The question raised upon this record is, what is meant by the estimated cash value? Is it the estimated cash value at the time of the insurance as settled by the parties and named in the policy, or the actual cash value at the time a second or further insurance is effected? There is no serious difficulty in resolving this question. The policy upon which this suit was brought, after

Elliott v. Lycoming County Mutual Insurance Company.

the stating the amounts insured on the properties described, adds, "Estimated cash value \$1,950." When therefore the same instrument in a subsequent part speaks of the estimated cash value it must be held in all fairness to refer to the sum before named, as much so as if it had been expressed. Nor can it alter the contract that the insured afterward made improvements, which greatly augmented the actual cash value, and that the company had notice of these alterations and indorsed a certificate that the risk was not thereby increased. The contract still remained unchanged. The estimated cash value by which the insured agreed to be governed in procuring other insurances was still the same. Both parties must agree to another estimate; and if the estimate named in the policy was not the criterion, then there was none. There is no authority at law or in equity to reform the contract by substituting "actual" for "estimated." The estimate was one in which the company had concurred, and by which they were therefore bound. They did not concur in any other estimate, which the insured might put upon it, or which a jury might subsequently agree upon. The plaintiff, before obtaining an additional insurance, ought to have procured the estimated cash value in the policy to be changed and made to conform to the actual augmented value in consequence of his improvements. It is unfortunate that he neglected to take this simple precaution, but having failed to do so, it is not in the power of chancellor or jury to help him.

It is stoutly maintained, however, that there was evidence of a waiver, which ought to have been submitted to the jury. Undoubtedly, if the company, after notice or knowledge of the over-insurance, treated the contract as subsisting by making and collecting assessments under it upon the assured, they could not afterward set up its forfeiture. It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests. *Insurance Company v. Stockbower*, 2 Casey, 199. But what was the evidence? The witness called by the plaintiff to prove the assessment, produced a letter addressed to the agent to whom the duplicate was addressed, instructing him not to collect it. The agent testified that he did make the demand, but on turning to the duplicate he noticed a memorandum made by himself that he was instructed not to collect that sum, and left immediately. The assessment was not paid. It would have been error under these circumstances to have submitted the question to the jury. It is

Funk v. Smith.

not every mere spark of evidence which a judge is bound so to submit. There must be enough to raise a reasonable question for decision.

Nor can it be pretended that the tender and payment into court of a sum of money as the loss on the stable was an affirmation of the entire contract. The stable was not included in the second policy of insurance effected with the North American Insurance Company. It could not, therefore, be said to have been over-insured. It may be that the defendants could have treated the entire contract as void and resisted a recovery for any part. Payment of money into court, when the declaration is on a special contract, admits a contract indeed so as to supersede the necessity of proving it at the trial. 1 Tidd's Practice, 625. It is an acknowledgment of the right of action to the amount of the sum brought in; but beyond the amount of that sum it is no acknowledgment of the right whatever. Id. 624. It waives the benefit of no defense, even though such defense be to the whole. It seems therefore that after payment of money into court there may be a nonsuit, a judgment as in case of a nonsuit, a demurrer to evidence or a plea *puis darrien continuance*, in short that the cause goes on substantially in the same manner as if the money had not been paid in at all; in other words, the defendant is not precluded by it from taking a defense which goes to the whole cause of action.

Judgment affirmed.

FUNK, appellant, v. SMITH.

(66 Penn. 27.)

Statute of limitations. Breach of contract. Sheriff's sale.

Defendant purchased certain premises at a sheriff's sale, but, failing to pay his bid, the premises were resold by the same sheriff nearly a year and a half afterward for a less sum. In an action to recover the difference between the bids, *held*, that the statute of limitations began to run from the time of the failure to pay the first bid.

ACTION by Funk, late sheriff, against Smith to recover the difference between the amount bid by defendant, for certain premises sold at sheriff's sale by plaintiff, and the amount for which the

Funk v. Smith.

premises were afterward resold, defendant failing to take the premises or pay his bid. The facts appear sufficiently in the opinion.

Judgment for defendant. Plaintiff appealed.

T. Banks and S. S. Blair, for appellant, cited *Holdship v. Doran*, 2 Penn. R. 15; *Gaskell v. Morris*, 7 W. & S. 32; *Wright's Appeal*, 1 Casey, 373; *Evans v. See*, 11 Harris, 88; *Overton v. Tracey*, 14 S. & R. 328; *Leinhart v. Forringer*, 1 Penn. R. 493; *Hill v. Meyers*, 10 Wright, 16; *Rice v. Hosmer*, 12 Mass. R. 127.

R. A. McMurtrie, for appellee, cited *Gaskell v. Morris*, *supra*; *Addison on Contr.* 1205, 1206; *Downey v. Garard*, 12 Harris, 54; *Miller v. Wilson*, id. 121; *Derrickson v. Cady*, 7 Barr. 32; *Steele v. Steele*, 1 Casey, 154.

AGNEW, J. The defendant, by his agent, Seth R. McCune, became the purchaser of certain premises at a sheriff's sale made on the 24th of January, 1860, for \$800; and failing to pay his bid, the premises were resold on the 20th of July, 1861, to H. Crumbacker, for \$580. This suit was brought on the 6th day of June, 1866, to recover the difference between the bids, and was decided against the plaintiff upon the plea of the statute of limitations. This is assigned as error. The force and effect of the plea of the statute will be seen by considering the contract on which the action is founded. The defendant merely bid the sum of \$800 for the premises knocked off to him at the sheriff's sale. There were no special terms of sale to vary the legal inference drawn from the bid, to wit, a promise to pay the sum of \$800 as the price of the property sold. The failure to pay this sum is evidently the breach of the contract from which a cause of action arose to the sheriff to enable him to recover the price bid or damages for its non-payment. The contract itself had but a single stem, and that grew directly up from the bid. There was no secondary promise branching off from this stem, to pay the difference in price between this bid and another bid afterward to be made. That is but the law's mode of measuring the damages when the sheriff, not choosing to recover the bid itself, puts up the property for sale a second time. It is not the result of an alternative contract to pay damages in lieu of the bid, but of the election of the sheriff to put up the property again, and to sue for the damages resulting from non-payment of

the bid. But as the failure to pay the bid is the only breach such a single promise is susceptible of, the right of action then arose, and cannot be postponed by the sheriff to any future period he may choose to designate. The statute begins to run at the time of the breach, and cannot be stopped except by mutual consent. The postponement of the second sale, after the breach of the contract by non-payment, is solely the act of the officer or of the party who directs him, for which the original bidder is in no way responsible. Could it be done without the consent of the bidder, it would be in effect to start a new period for the running of the breach, or to treat the contract as having a double obligation. But, as remarked in *Miller v. Wilson*, 12 Harris, 120, using the language of Chief Justice Bessr, "the thing has but one neck, and that is cut off by the defendant, and it would be mischievous to drive the plaintiff to a second, third or fourth action, as the successive consequences of the wrong may arise. It is not true, even as a general rule, that courts will not anticipate a loss in future." Much harder would it be for the defendant if the successive consequences would suspend the running of the statute. It would not be a statute of repose, but a wakeful watch to keep the defendant ever in suspense. In the present case, if the property were put up a third, fourth or fifth time at long intervals, and a failure to pay the bid each time, it would be difficult to settle the time of the running of the statute; yet it is clear as a fact, the first bidder's breach of his contract is not shifted by all these subsequent occurrences. There are analogies illustrating the principle that the statute runs from the time of actual breach of the promise, when it is single in its form; unless in cases of pure trusts, or where the breach has been concealed by the defendant. Thus in *Campbell v. Boggs*, 12 Wright, 524, in the case of the collection of money by an attorney in fact, it was held that the statute runs from the time of the failure to pay over the money, and not from the time of notice to the principal of its receipt, unless there have been a fraudulent concealment by the attorney. WOODWARD, J., remarked: "For on what is the action founded, but the breach of the implied contract? And when is the contract broken? Manifestly when the money is not paid over within a reasonable time after it is received. Then at that point the cause of action accrues, not years afterward, when the client, with a lack of diligence for which he alone is responsible, discovers that it is in the hands of his counsel.

The Commonwealth v. The Pennsylvania Canal Company.

Actions on the case for consequential damages are not to be brought till the damages are developed, but actions for breach of contract do not wait on the consequences, but attach at the breach. The measure of damages in these actions may be less affected by consequences resulting from the breach, but they do not give the right of action. That arises the instant the contract is broken." This language might well be written for the present case. See also *Downey v. Garard*, 12 Harris, 52, in which a similar rule is adopted.

Judgment affirmed.

THE COMMONWEALTH, appellant, v. THE PENNSYLVANIA CANAL COMPANY.

(66 Penn. 41.)

Constitutional law. Navigable river. Eminent domain—private property for public use.

A railroad company, to which the absolute sale of a State dam on a navigable river was made, held a charter from the State, in which there was no power of change or revocation reserved. Subsequently the legislature passed an act requiring every individual or corporation having or maintaining any dam on the river to construct and maintain a sluice, or other device, for the free passage of fish. The railroad company assigned its interest in the dam to a canal company formed after the passage of the fish act. On an indictment against the canal company for a failure to comply with the act, *held*, that the power to cause the changes to be made in the dam was within the right of eminent domain; but that the act was unconstitutional, in so far as it imposed the burden of expenses of the changes upon the canal company, because it authorized the "taking of private property for public use without compensation."

INDICTMENT against the Pennsylvania Canal Company. It appears, in brief, that the State of Pennsylvania, in 1827, constructed a dam across the Susquehanna river, at Duncan's Island, and maintained it until 1857, when it sold all its right in the dam to the Pennsylvania Railroad Company, chartered in 1846; that the charter of the railroad company contained no power of change or revocation reserved by the State; that in March, 1866, the legislature passed what is known as the fish act, requiring every individual or corporation, having or maintaining any dam, etc., on

The Commonwealth v. The Pennsylvania Canal Company.

the Susquehanna and its branches, including the Juniata, to maintain and keep up at such dam, etc., a sluice, or other device, for the free passage of fish and spawn up and down the stream; that in May, 1866, the Pennsylvania Canal Company, this defendant, was incorporated, and authorized to purchase from the Pennsylvania Railroad Company (and the railroad company was authorized to sell) certain property and franchise owned by the railroad company, including the dam; that such purchase was made, and that the canal company neglected and refused to comply with the terms of the fish act. Whereupon, on the 21st day of November, 1867, it was indicted according to the provisions of that act. The remaining facts appear in the opinion of the court, and in the opinion of Judge PEARSON, which was adopted by the supreme court and which is appended to the case.

Judgment for defendant. Appeal by the State.

J. W. Simonton and *F. C. Brewster*, Attorney-General (with whom was *R. L. Munch*), for the State, cited *Southwark Railroad v. Philadelphia*, 11 Wright, 314; *Iron City Bank v. Pittsburgh*, 1 id. 340; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420; *Susquehanna Canal v. Wright*, 9 W. & S. 11; *Monongahela Nav. Co. v. Coon*, 6 id. 113; *Bank of Penn. v. Commonwealth*, 7 Harris, 155; *Commonwealth v. Erie & N. E. Railway Co.*, 3 Casey, 359. The defendant having been incorporated subsequent to the fish act, took subject to it. *Armstrong v. Treasurer of Athens Co.*, 16 Pet. 281; *Pratt v. Atlantic & St. Lawrence R. R. Co.*, 42 Me. 579; *Bowen v. Lease*, 5 Hill, 221; *Bank v. Nolan*, 7 Miss. 508; *Bank v. Archer*, 8 Smedes & M. 151; *Coffin v. Rich*, 45 Me. 507; *Easton v. The Commonwealth*, 10 Barr. 442; *Prov. Bank v. Billings*, 4 Peters, 514; *Norris v. Androscoggin R. R.*, 39 Me. 273; *R. R. Co. v. Smith*, 37 id. 35; *English v. N. H. & Northampton Co.*, 32 Conn. 240; *Monongahela Nav. Co. v. Coon*, 6 Barr. 379; *McCraken v. Hayward*, 2 How. (U. S.) 612; *Ogden v. Saunders*, 12 Wheat. 259; *Pomeroy's Const. Law*, 382, 388; *Cooley's Const. Law*, 285, 286. The fish act is within the province of legislation. *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 149; *Railway Co. v. Gilleland*, 6 P. F. Smith, 452; *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Nav. Co.*, 14 S. & R. 71; *Moulton v. Libbey*, 37 Maine, 472; *Dunham v. Lamphere*, 3 Gray, 268; *Hart v. Hill*, 1 Whart. 132; *Angell on Watercourses*, § 86; *Comm'th. v. Tewksbury*, 11 Metc. 55;

The Commonwealth v. The Pennsylvania Canal Company.

Coates v. The Mayor, 7 Cow. 585; *Brick Church v. The Mayor*, 5 id. 588; *Cooley's Const. and Stat. Lim.* 579, 580, 597; *Gilman v. Philad.*, 3 Wall. 730.

L. W. Hall and *F. Jordan*, for the company, cited *Pierce* on Am Railroad Law, 20; *Monon. Nav. Co. v. Coon*, 6 Barr, 381; *Erie & N. E. Railroad Co. v. Casey*, 1 Grant, 275; *Comm'th v. Cullen*, 1 Harris, 133; *Brown v. Hummel*, 6 Barr, 86; *Terrett v. Taylor*, 9 Cranch, 43; *Calder v. Bull*, 3 Dall. 386; *City of Erie v. The Erie Canal Co.*, 9 P. F. Smith, 174. Angell on Watercourses, §§ 457, 458, 459, etc.; Redfield on Railroads, 555, 556; *Pierce* on Am. Railroad L. 38; 2 Kent's Com. 408, 409; *Crenshaw v. The State River Co.*, 6 Rand. (Va.) Rep. 245; *Washington Bridge Co. v. The State*, 18 Conn. Rep. 53; *Miller v. The New York & Erie Railroad Co.*, 21 Barb. Rep. 513; *Bell v. Ohio & Penn. Railroad Co.*, 1 Grant, 103; *Erie v. The Erie Canal Co. supra*; *Comm'th. v. Reed*, 10 Casey, 275; *Cooley* on Constitutional Lim. 577, 578.

SHARSWOOD, J. The very able and exhaustive opinion of the learned presiding judge of the court below, in entering judgment upon the special verdict, relieves us from the necessity of any further discussion of the important constitutional and legal questions involved in this case. That opinion is in entire accordance with our own views, and we adopt it as the opinion of this court. (See *post*.)

It is strongly urged, however, on behalf of the commonwealth, and this has been the principal contention here, that he fell into a fundamental error, which vitiated all his reasoning, by treating the case as though it were a question between the commonwealth and the Pennsylvania Railroad Company, who were the original purchasers of the dam at Duncan's Island, together with the other public works, under the provisions of the act of assembly, passed May 16, 1857 (Pamph. L. 519), entitled "an act for the sale of the main line of the public works." It is apparently conceded that the Pennsylvania Railroad Company took the works under that act by contract, and paid for them to the State a valuable consideration, and consequently the State could not impose upon their grantee any new burden not contained in the original sale; for that would be for one of the parties to add a new term or condition

The Commonwealth v. The Pennsylvania Canal Company.

to the contract. In that respect the case is stronger than *The City of Erie v. The Erie Canal Company*, 9 P. F. Smith, 174, for the Erie Canal Company was the donee rather than the vendee of the commonwealth. But it is said that by the act of 1857 the Pennsylvania Railroad Company were not authorized to sell any part of the works to the Pennsylvania Canal Company, because, at the time of the original sale of the whole, it was not then an existing corporation, and consequently, when the last named company were incorporated by the act of May 1, 1866 (Pamph. L. 1068), and were thereby authorized and empowered to purchase, take and hold from the Pennsylvania Railroad Company, and which said railroad company were thereby authorized and empowered to grant, the canal from Columbia to the junction at Duncan's Island, etc., with all the property and appurtenances thereto appertaining, they necessarily took the same under and subject to the provisions of the previous act of assembly of March 30, 1866 (Pamph. L. 370), entitled "an act relative to the passage of fish in the Susquehanna river and certain of its tributaries," for a violation of which this indictment was preferred. The argument has great ingenuity and plausibility, and if its premises be admitted the conclusion would have to follow logically and inevitably. All legislative acts alienating public rights or domain are to be strictly construed, and no such grant is to be inferred by implication merely. Accepting this as not only the well established, but sound and reasonable canon of construction, let us examine how it applies in the case before us; whether there is not here a sufficient actual expression to be beyond the reach of the rule. By the third section of the act of 1857, it was provided, "that it shall be lawful for any person or persons, or railroad or canal company now incorporated or which may hereafter be incorporated by and under the laws of this commonwealth, to become the purchasers of the said main line of the public works." Then, after various provisions, applicable specially and severally in case individuals or associations of individuals, or the Pennsylvania Railroad Company, should become the purchasers, and directing, in the fifth section, that immediately after the said purchaser or purchasers, or their assignee, shall take possession of the same, the said purchaser or purchasers, or assigns, shall be bound ever thereafter to keep in good repair and operating condition, the main line of said railroad and canal, extending from Hollidaysburg to Philadelphia, etc.; it is

The Commonwealth v. The Pennsylvania Canal Company.

added, in these words: "provided that said purchasers be authorized to grant, sell and convey, or to lease for a term of years, upon such conditions as may be agreed upon, any part or portion of said canals, and any corporation or association of individuals, authorized by this act to purchase the whole, may purchase or lease such portions and hold the same subject to the conditions and entitled to all privileges contained in this act." As by the third section any corporations thereafter to be incorporated were entitled to become purchasers of the whole, it would seem at first blush to follow by the express words that such corporations would also be authorized to become sub-purchasers or lessees of part. But it is maintained, and here is the stress of the argument, that by the third section it was only meant that corporations, which should be incorporated between the date of the act and the sale should become purchasers; for how, in the nature of things, it is asked, could a corporation purchase, which was not in existence at the time of the sale? By a necessary inference, a corporation not in existence at the time of the sale could not become a purchaser of a part under the fifth section. The argument is more refined than solid. We must bear in mind that an established canon of construction is that *verba relata hoc maxime operantur per referentiam ut in eis inessee videntur*. If, in pursuance of this rule, we transfer the words of the third to the fifth section, they must then receive the same construction which it is conceded that they have in the third section, so as to authorize a sale to any corporation created after the passage of the act and before the sale or lease mentioned in the fifth section. That this was really the mind of the legislature can hardly be matter of doubt with any one who reflects upon the circumstances of the case. That body cannot fail to have perceived that the only really practicable mode by which a sub-sale or lease of part of a work of that character was likely to be effected would be by some corporation specially to be created for the purpose, just as they evidently did see the same thing in the provision made for the original sale of the whole. It was highly improbable that any corporation existing at the time of the original sale could, consistently with its charter, unless incorporated expressly for the purpose, become a sub-purchaser. The Pennsylvania Canal Company, incorporated May 1, 1866, and specially authorized, as we have seen, to purchase from the Pennsylvania Railroad Company, became their assignees under and by virtue of

The Commonwealth v. The Pennsylvania Canal Company.

the original power to sell, contained in the act of 1857, and of course took the subject of the grant with all the privileges thereby conferred upon them. Nay, the terms of the act of incorporation, May 1, 1866, seem intended to leave no possible doubt upon this point, for it declares that they shall be vested "with all the powers, privileges and franchises granted or intended to be granted" to the Pennsylvania Railroad Company. And this is again repeated: "And the said Pennsylvania Canal Company, their successors and assigns, be and they are hereby vested with the said powers, privileges and franchises." They became, thereby, the assignees of the Pennsylvania Railroad Company, and stood in their shoes to all intents and purposes as parties to the contract authorized by the act of 1857. The learned presiding judge below, therefore, fell into no error in treating the case as though it was a question between the commonwealth and the Pennsylvania Railroad Company.

The franchises conferred upon the Pennsylvania Railroad Company, and vested in the Pennsylvania Canal Company, as their assignees, on this great public highway, are undoubtedly still within the right of eminent domain of the State, and may be resumed or taken under the limitation of Art. IX, sect. 10, of the constitution, "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being made:" *West River Bridge Co. v. Dix*, 6 How. (U. S.) Rep. 507; *Commonwealth v. Pittsburg and Connellsville Railroad Co.*, 8 P. F. Smith, 50.

Judgment affirmed.

NOTE.—The following is the opinion delivered by Judge PRAMSON in the court below, and adopted in the foregoing opinion—*REPR.*

"The State of Pennsylvania, about the year 1827, constructed a dam across the Susquehanna river, at Duncan's Island, for the purpose of feeding its canal, then about to be completed, and kept it up to supply the public works with water until the year 1857, when the whole right of the State was conveyed absolutely to the Pennsylvania Railroad Company by deed, pursuant to the provisions of the act of May 16, 1857. That company made use of the dam for the same purpose until it sold and transferred all its interest in the property, from Columbia to Hollidaysburg, including the dam now in dispute, to the Pennsylvania Canal Company, in pursuance of the act of May 1, 1866, by which that company was incorpo-

The Commonwealth v. The Pennsylvania Canal Company.

rated and authorized to make the purchase. The Susquehanna is one of the great rivers of Pennsylvania, navigable by nature, over which the State has exclusive control by virtue of its right of eminent domain. The claims of riparian owners to its shores run no further than ordinary low-water mark, and between that and the high-water boundary, the public has the right of free passage, and the State the privilege of taking possession at any time without making compensation to the land-owner, who has but a qualified property in the intermediate space. See 1 Penn. R. 467; 1 W. & S. 364; 6 id. 112, 113, 114.

"The dam was therefore the absolute and unqualified property of the commonwealth, which by its deed, made in pursuance of the act of 1857, conveyed all of its rights therein to the Pennsylvania Railroad Company on the 31st day of July of the same year. The act of Assembly authorizing this conveyance is most full and ample, only reserving the power in the State to revoke the grant for misuse or abuse of the privileges granted after a *judicial decree* of such misuse or abuse first duly had and obtained.

"The railroad company to which this sale was made, held a charter from the State, granted in the year 1846, in which there is no power of change or revocation reserved, consequently it was then and still continues beyond and above legislative control. The State has precisely the same power over property granted to a corporation that it has over a like grant to a private individual--no more, no less; 6 How. 533. Thus stood the right to this feeder dam on the 30th day of March, 1866, when the act relating to the passage of fish in the Susquehanna river was passed, under which the indictment in the present case was preferred. The act of assembly last referred to, requires every individual or corporation having or maintaining any dam, weir or other obstruction on the Susquehanna and its various branches, including the Juniata river, to maintain and keep up at each of said dams, weirs or other artificial obstructions, a sluice, weir or other device for the free passage of fish and spawn up and down said stream, in such manner and on such plan as a commissioner to be appointed by the governor may devise. Working plans are to be furnished by the commissioner, who is to inspect the dam immediately after the 1st of November next following, and if the device shall not have then been constructed as prescribed, the commissioner is to report the delinquency to the district attorney of the proper county, who is

The Commonwealth v. The Pennsylvania Canal Company.

to cause an indictment to be preferred against the delinquent corporation or individual. The failure to erect and keep up devices in the dams in the mode prescribed by the commissioner, is declared to be a misdemeanor, and the dam a public nuisance; the violators of the law are subjected to a heavy penalty, and if the work be not completed within thirty days, the dam is to be abated by the sheriff at the cost of the individual or corporation offending. The Pennsylvania Canal Company, under its purchase from the Pennsylvania Railroad Company, made on the 30th day of March, 1867, has kept up the dam, and neglected and refused to make the sluices as required by the act of assembly, and consequently was indicted at the November term of court of Dauphin county, and a true bill found on the twenty-first day of that month.

"A special verdict was taken embracing every fact necessary to raise the legal positions presented on the argument, which we will now proceed to consider. The defendant answers that the statute under which it is indicted was repealed by the act of April 13, 1867, which provides that the several provisions of the second section of the act entitled 'an act relating to the passage of fish in the Susquehanna river and certain tributaries,' approved March 13, 1866, be and the same are hereby continued to the 31st day of December, 1866. On looking into the provisions of the second section thus referred to, we find that certain of its enactments expired in effect on the first Monday of December, 1866—as the duty of the commissioner, for instance. If that officer had failed to fix the width of the weirs, steps or sluices, or determine their location on the various dams, to furnish the working plans on which the sluices were to be constructed, to obtain the approval of the governor thereto, or to inspect the same and report the delinquency to the district attorney, the power on the part of that officer had ceased, and it was the intention of the legislature to prolong it by the act of 1867. The statute is hastily and carelessly drawn; but by applying its words to the provisions of the act of 1866, which had expired, we do not infer the absurdity to the legislature of intending to continue provisions which had not expired, to wit, the power to indict or punish for keeping up that which the law declared a nuisance, and concerning which the enactment is perpetual. It is our duty to so construe the laws as to prevent an absurdity. This can readily be done in the manner indicated, and such is the obvious meaning of the act. Apply the maxim *reddendo*

The Commonwealth v. The Pennsylvania Canal Company.

singula singulis, and the two laws may well stand together. Had the act expired, as assumed, the legal position that the indictment must fall would have been clearly tenable, for if the law expires or is repealed before indictment, there can be no prosecution, or if after conviction sentence cannot be pronounced. It is scarcely necessary to cite authorities for so plain a position; but we find them in 1 Binn. 601; 1 Whart. 460; 1 Wash. C. C. R. 84; 10 Watts, 351; 8 Smith's N. Y. R. 95. It is also urged that as this law is highly penal in its character, it must be strictly construed, and is *ex post facto* in its operations, punishing that which was lawful at the time it was passed. This statute does not pretend to punish the defendant for erecting the dam. It was lawfully built by the State, and kept up by it and the Pennsylvania Railroad Company for nearly forty years before this defendant had existence as a corporation. The law does not declare the *erection* unlawful, but forbids the keeping up of the work after the owner has been furnished by the commissioner with the plan devised for the passage of fish without making the sluices, etc., as required by the statute. It is the failure to make the change after due notice which is declared to be a public nuisance, and keeping up the dam in contravention of the legislative command.

"It is said that the act of assembly is in violation of the State and national constitutions in this: That it impairs the obligations of a contract, between the State and the Pennsylvania Railroad Company, entered into when the State sold its works; violates the charters, both of that and the canal company, by imposing burdens on them, which neither their charters nor the laws of the land require them to bear, and takes private property for public use, without paying or securing any equivalent. To this it is answered by the commonwealth that, as the Susquehanna was by nature a public navigable river, the people on its banks had an inherent right of free fishing, which could not be impaired or taken away. That the State possesses the right of eminent domain for the benefit of the people, and cannot part with, sell or abandon it. A charter granted to a corporation is of no greater efficacy, or of more binding obligation, than a deed to an individual; and its franchises are subject to the power of eminent domain, and are under the control of the legislature; that there is no taking of this property; and even if taken, it does not impair the contract. The point mainly relied on in response to the defense is, that this law is an exercise

The Commonwealth v. The Pennsylvania Canal Company.

of police power, which the State possesses over all persons or property within its borders, is held for public benefit, and cannot be parted with or abandoned; and lastly, that the exercise of the right complained of is not a violation of the words of the constitution, and before a law can be declared void by the courts on account of impinging with the organic law, it must be clearly so, and come within the prohibition of the very letter. It would be a waste of time, at this day, to argue that a grant is a contract executed, and the property once granted cannot be resumed by the State, without the consent of the grantee. It is equally useless to cite authority to prove that the charter of a corporation cannot be revoked, or altered, against its consent, unless when the power of revocation or alteration is reserved in the grant, in general laws previously passed and applicable to their incorporation, or in the constitution itself. If the State has, in the mode prescribed by law, granted a tract of land to an individual for a valuable consideration, it cannot, by law, revoke the grant and resume the property; and even when taken for necessary public purposes, must pay the owner a full equivalent. The same rule applies, both to the franchises and property of a corporation. In the present case the State, for a full and valuable consideration, granted and conveyed its canal and railroad improvements to the Pennsylvania Railroad, a corporation over the charter of which it had retained and possessed no control whatever. That company had held and enjoyed the property for about nine years, when the act of 1866, relating to the passage of fish was passed. By that law, the legislature attempted to impose on this company the burden of changing all its dams, from and including the one in controversy, up to and along the Juniata to Hollidaysburg, so as to secure the free passage of fish through all the dams, some twenty-six in number; and the expense of making the directed alterations, it is said, will amount to over \$200,000, independent of the cost of keeping them in repair. These alterations in the dams, it will be borne in mind, are not for the benefit of the present owner, which will, it is said, be greatly injured thereby in the loss of the necessary supply of water for its canal, but is intended for the benefit of the people at large, and the riparian owners in particular, by securing an abundant supply of fish. We would naturally conclude that in such a case the expense of these alterations should rather be borne by the public at large, or the persons who are to be especially benefited, than by the purchaser for value, who is to receive no

The Commonwealth v. The Pennsylvania Canal Company.

benefit, but will be essentially injured by the change. It is said, however, that there is no taking of the property of this corporation under the statute, and therefore it cannot claim the protection of the constitutional prohibition. Although the dam in question is not taken, the money of the owner must be to a very considerable amount before the alterations and improvements required by the statute can be completed. It transcends the power of the legislature to throw such a burden on its grantee. When the legislature incorporated a company to make a bridge with a draw of thirty feet, it was decided to transcend the power of the legislature to require the draw to be extended to fifty feet. 18 Conn. R. 54. Also held that a railroad company could not be obliged to make bridges for county roads across their track when the charter contains no such obligation. 2 Barb. 513. Franchises cannot be changed without the consent of the corporators, properly expressed. The legislature cannot interfere with corporate property or franchises. *Brown v. Hummel*, 6 Barr. 86. When no power is reserved for the legislature to alter the charter it cannot be done, nor can additional burdens be thrown on it without the consent of the corporators. *Commonwealth v. The Monongahela Nav. Co.*, 6 Barr., 379. See also Harrington's Rep. 389, 9 Cranch 292; *Dartmouth College v. Woodward*, 4 Wheat. 518, and numerous other cases. But wherefore investigate these decisions when we have an authoritative exposition of the constitutional power of the legislature, made in a very recent case by our supreme court, which is binding on us as an inferior judicial tribunal, and which we have neither the legal power nor inclination to disregard.

"The State of Pennsylvania, some years since, donated the canal extending from the mouth of the Beaver to the city of Erie to a company incorporated to receive, complete and keep it up. The charter required the company to maintain farm bridges; but no mention was made of those on the public streets and highways. The State had built, and was accustomed to keep up those bridges. Some in the borough of Meadville fell into decay and were rebuilt by the town authorities, which sued the canal company for the expense thereof; but it was decided that the corporation law did not require it to keep up these bridges. See *Meadville v. Erie Canal Company*, 6 Harr. 66. In 1864 an act was passed requiring the company to build and keep up the bridges on the public streets and highways; which the corporation refused to do, and was sued

The Commonwealth v. The Pennsylvania Canal Company.

by the city of Erie for the expense incurred in rebuilding those in that city. But it was held by DERICKSON, J., on full consideration in the court of common pleas, that the legislature had transcended its power in passing the law; and the judgment was affirmed by the unanimous opinion of the supreme court, in a most lucid argument by SHARSWOOD, J. See *The City of Erie v. The Erie Canal Company*, 9 P. F. Smith, 174. That was a vastly more favorable case for the exercise of legislative power than the one before us. There the State had originally built all of the bridges on the streets and highways, including those in question, and had always kept them up. The canal was *given* to the company by words of equivocal meaning, but probably intending to bind the company to do the same thing, but not so expressed. Here the public works of the State were sold to the Pennsylvania Railroad Company for \$7,500,000. The dam was built and had always been kept up by the commonwealth, without any sluice, causeway or other device for the passage of fish, as had all of those embraced in the act of 1866, which the railroad company was required to change at its expense. There was an apparent fairness in the law relating to the Erie canal, as it only required the donee of the State to do what the donor had always done whilst it held the property. There is nothing but unmitigated hardship and injustice in the act of 1866, which obliges a purchaser, for value, to do what the vendor had never done when it built, or whilst it owned and kept up the dams by virtue of its sovereign power. The purchaser had a right to expect it would be permitted to use and enjoy the works as they had always been held and enjoyed by the State, without expense or molestation by the legislative authority. It is said, however, that the State can cause the dams on the river and its branches to be changed or even vacated by virtue of the right of eminent domain, an attribute of sovereignty vested in every government for the benefit of the people, and which can neither be parted with or abridged. There is no doubt of the power of this commonwealth over the public rivers within its borders, and it was by virtue of its sovereignty that it took possession of the Susquehanna, the Juniata and other streams, and obstructed them with dams for what it considered the benefit of the people, although thereby the passage of fish was prevented, and the fisheries destroyed. But it also sold the whole works for what was considered the public good. The dams became, after such erection and sale, private property, and if now

The Commonwealth v. The Pennsylvania Canal Company.

taken under the power of eminent domain for public use or benefit, it must be done on paying the owner an equivalent.

"The present law proposes nothing of the kind, but on the contrary requires the corporation to make all of the changes and keep them up at its own expense. This transcends sovereign power. It is prohibited by the constitution. The State might as well undertake by legislation after it had parted with its land to A. for a full consideration, and conveyed it in all the forms of law, to transfer it over to B., and compel A. to make a conveyance, or after it had thus parted with its property, oblige A. to build a church or school-house for public benefit on the land at his own expense. One of the highest attributes of sovereignty, and most essential to the existence of the State, is the power of taxation, yet that may be released for a consideration, and cannot be resumed without the consent of the grantee. See *New Jersey v. Wilson*, 7 Cranch, 164; *Gordon v. Appeal Tax Court*, 3 How. 133; *Bank v. Knoup*, 46 id. 369; id. 369; id. 416-432, and many others to the same effect. This is the settled law as declared by the highest judicial tribunal in the country—the supreme court of the United States.

"It is further contended that the State can compel the holder of these dams to fit them for the passage of fish by virtue of its police power, the alteration being of great public benefit and necessary for the welfare of the people. This power is very extensive in preventing nuisances of almost every kind, as removing noisome smells, offensive trades, dangerous, explosive substances, that which is deleterious to health, or dangerous to the lives of the people. The interment of the dead in a great city has been forbidden, although the corporation was expressly created for that purpose, and endowed with the authority to use the location. *Coates v. The City of New York*, 7 Cow. 585. Every right is granted under the implied condition that it shall not injure others. Id. 605. It has been held in several of the States that a railroad company could by law be obliged to fence its road, and although no such power was retained in the words of its charter, the same being necessary for public safety and that of the neighboring stock running at large. See 12 Ind. 3; 16 id. 84; 27 Vt. 140. The corporation was subject to police regulations, and may be obliged to inclose its track under the penalty of paying for all cattle killed or injured. 25 Ill. 140; 28 id. 284-290. The road takes nothing by inference

The Commonwealth v. The Pennsylvania Canal Company.

or intendment, and may be obliged to do whatever the public good requires unless expressly exempt by its charter. 27 Vt. 140.

"The right of control over the waters of the State has perhaps been carried further as a police power in the State of Massachusetts than in any other, where the common law prevails, and that whether the franchise was in the hands of an incorporated company, or the property and privileges were claimed by a private individual. The common law may have been changed to some extent by early custom, or the power over the streams of water secured to the public by provincial legislation; for we find it decided as early as 4 Mass. 528, that where permission was given to the owner of land to build a mill, as early as 1633, and he was granted a several fishery, the legislature could require him, after the expiration of a hundred years, to make a passage for the fish, and when badly done to rebuild it at the expense of the owner. The whole subject underwent careful examination in *The Commonwealth v. Alger*, 7 Cush. 53, 101. It was held that the right of free fishing and navigation was a public right, and could be controlled by legislation, although private rights were injuriously affected (see also 4 Pick. 460, 462; 5 id. 199), and a man may be prohibited from moving timber or gravel from his own land, if by its removal the public is likely to be injured; although by such prohibition the land is greatly lessened in value. 4 Met. 55. On the other hand, it was decided in Virginia, that when permission was given to an individual to erect a dam, in the mode prescribed by law, which was done, and long enjoyed, that it transcended the power of the legislature to compel the owner, at a late day, to erect a lock therein for the passage of boats at his own expense. 6 Rand. 245, considered with great care. So in the State of New York, *The People v. Platt*, 17 Johns. 195, where land was granted covering a stream not naturally navigable, the legislature cannot impose burdens on the owner of a dam erected thereon before the passage of the law declaring it a highway, without making or providing for compensation. It is impairing the grant, which is in violation of the contract. If a private stream is made navigable, the legislature cannot appropriate it to the public without compensation (Angell on Watercourses, 601, § 539, 27 Fairfield [Maine] 81), and after granting it to an individual, cannot divest his right, without compensation, by declaring it a highway. It has long been considered the law of Pennsylvania, that when the line of survey runs across streams of water, and the owner of

The Commonwealth v. The Pennsylvania Canal Company.

the land erected a mill-dam on the stream, he could keep it up without molestation after the legislature had declared the creek or river a public highway, and the owner could not be obliged to fit this dam for the passage of boats and rafts; but if done, it must be at the public expense. Such owner might as well be required to remove bars, rocks or drift-wood for the convenience of navigation, by virtue of the police power, as to fit up a dam so erected. The case has been likened to that of paving and sidewalks in cities, or opening streets at the expense of lot owners; all of which has been sustained by our courts (see *Schenley v. The City of Allegheny*, 1 Cas, 128; also 3 Watts, 592), or compelling a borough to pay more than its proportion toward the erection of a court-house. 7 Harr. 258. But it must be borne in mind that in each of these cases the owner was benefited or supposed to be, and therefore payment was lawfully enforced.

"The legislature professes, and has always exercised, unlimited control over municipalities, and the citizens thereof who, by uniting with larger bodies, bring themselves and their property under management for the benefit of the whole. As we understand the police power of the State, which has been strongly pressed upon us as being unlimited and uncontrollable, and which no State can part with, it is nothing more than the authority to compel all owners of property so to use their own as not to injure others; that therefore the State cannot, by contract or otherwise, part with the power to compel the owner of real estate so to use it as not to endanger the public health or safety. This is, perhaps, the extent to which writers on that subject press the doctrine. See Coole's Const. Lim. 282, 283; id. 276, 277, 278. But if it can be invoked for the purpose of enabling a State to revoke its grant, violate its contract, or take the property of an individual for public or private use, without making compensation, it is a most dangerous power, and enables the legislature to do that which is expressly forbidden by the constitution. Our only reason for examining the subject at such length is, that the authority has been strongly pressed, and it has been urged that the exercise of the power has never been presented to or commented on by the courts of our State in any of the decided cases. We are well aware that no law can properly be declared unconstitutional unless it clearly violates the provisions of the organic law. But, as we understand this enactment, it takes the property of this corporation defendant for public use, without paying any equivalent, and

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

clearly alters the character of the contract made with the railroad company at the time of the sale; in legal effect, violates the contract, and changes the charter of the company to which it sold; an act which transcends its power. It is very true that the present defendant was incorporated since the amendment of the constitution, and which gives the legislature the power to change and modify the charters of incorporate companies at its pleasure, provided, in its opinion, no injustice will be done to the corporators. But it will not be pretended that the legislature, by the act of the 30th of March, 1866, undertook to construe or modify the charter of the Pennsylvania Canal Company, which had no legal existence at the time, but was incorporated on the 1st of May, 1866, and secured a transfer of the works from the railroad company on the 30th day of March, 1867. The whole act of assembly, in relation to the passage of fish, is aimed at the railroad company, over the charter of which the legislature had no control whatever.

“We are aware that our decision will be a great disappointment to the people who ardently desire, and fully expected an ample supply of fish by the change of these dams. We are of the opinion that the alteration can be made if the same is deemed useful, but it must be done at the public expense; the defendant cannot be obliged to bear the burden. It is our duty to declare this act null and void, so far as it imposes on this company the duty of changing the dams at its own proper cost; and we therefore render judgment in favor of the defendant on the special verdict.”

**PITTSBURG, FORT WAYNE AND CHICAGO RAILWAY Co., appellant,
v. COMMONWEALTH.**

(66 Penn. St. 72.)

Taxation — railroad bonds — inter-State railway.

The stocks and bonds of an inter-State railway are liable to taxation by any State in which it is situate in proportion to the length of the road in such State.

APPEAL by the Pittsburg, Fort Wayne and Chicago R. R. Co. from the settlement of taxes, under the laws of Pennsylvania, upon interest of the funded debt of the company.

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

The Pittsburg, Fort Wayne and Chicago Railway Company was incorporated by the States of Pennsylvania, Ohio, Indiana and Illinois. The road is about 469 miles in length, some 47 miles of which is within the State of Pennsylvania. The average funded debt of the company amounts to some \$12,671,000, the most of which is secured by first, second and third mortgages, beside \$59,500, a loan made to build a depot at Chicago, the whole bearing interest at the rate of 7 3-10 per cent, payable semi-annually, as appears by the returns made by the company to the auditor-general's office. The whole indebtedness is secured by bonds with coupons attached.

The accounting department of Pennsylvania charged the company with a tax on its interest paid to the bondholders for a fractional portion of the year 1864, and the whole of 1865, 1866 and 1867, amounting to \$14,789.01 in all, and deducted therefrom the commission to the treasurer of the corporation, amounting to \$278.90, computing the tax according to the supposed length of the road within this State, 50-469 parts. No exception is taken to the amount, but it is contended that no tax whatever can be imposed on these loans, as the whole road is not situated in Pennsylvania, but in three other States, mainly in Ohio and Indiana, and partly in Illinois; and the company does not know from which of the coupons to make the deduction, and consequently cannot lawfully take it off of the claims of any holder.

The following is the charge of Judge JACKSON, referred to in the opinion.—*RAR.*

Two questions are presented. First, Can the legislature impose the tax? and second, Is it done by our laws? The power to tax rests upon necessity, and is inherent in every sovereignty. It is unlimited in extent, except by express constitutional prohibition, and in amount is co-extensive with the wants and necessities of the government. It applies to every species of property or rights, either created or protected by the law; and although it may not be imposed upon, or enforced against, the persons of individuals not amenable to, or protected by, the laws of the State, yet it may against every species of property or rights which come within the limits of the commonwealth. This corporation derives its franchises, in part, from Pennsylvania legislation; all of its property within the State is protected by our laws, and although the creditors of the company are beyond our borders,

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

yet their debts, and the effects from which they must be paid, the *franchises and corpus* of the railroad, are under State jurisdiction and protection, and the holder of the obligation must depend upon our laws for its collection. What would his debt be worth if he could not look to our laws for its enforcement? And the very property which stands as its security was created, and is upheld, by our authority. We think that it would be impossible to doubt the power of the State to tax the stock of the non-resident corporation in this road, or at least so much of it as is constructed in Pennsylvania, and to enforce payment if necessary by a seizure of the property and franchises of the corporation; and why should not the same right exist against the debts with which the road was built? They equally have and require the protection of our laws, and the principle of taxation is correlative with protection.

By the thirty-second section of the act of 1844, all moneys owing by solvent debtors were subjected to taxation, however the same might be secured, and this even fell on the holder of State bonds and stocks, which tax the State treasurer was required to withhold from the creditor, when paying interest. By the act of May 1, 1854, Pamph. L. 536, it is declared "that all bonds and certificates of loans of any railroad company incorporated by this commonwealth, be and the same shall be liable to taxation for State purposes *only*." Showing most clearly the legislative intention to relieve those debts from the burden of county and township taxes, but to subject them to that of the commonwealth. No method was provided for collecting this tax where the creditor resided out of the commonwealth, until the enactment of the act of April 30, 1864, the third section of which required the president, treasurer, cashier or other officer of any company incorporated by the laws of this State, to deduct the State tax due upon its bonds or indebtedness, and pay over the same to the State treasurer. A similar provision is made as to city or county bonds, by the fourth section of the same act. See Pamph. L. 1864, p. 219. No exception is allowed as to the debts due to non-residents by either of these enactments. Money is quite as likely to be lent to citizens of another State by one of our cities or counties, as to a railroad company; yet it is probable that the duty and obligation of such city or county treasurer to retain the tax was never doubted. No one can read these various enactments without coming to the

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

conclusion that it was the legislative intention to collect a State tax from all creditors of corporations, whether private or municipal, without regard to the residence of the holder of the obligation; and it is equally manifest that this system of retention was designed to meet the case of absentees, as our own citizens were obliged to return their amount of money at interest to the township assessors. If the non-resident holder of such bonds could not be taxed, the most gross frauds would be practiced by colorable transfers to persons out of the State, or by handing over the coupons to such for presentation to the treasurers.

But why should we, sitting in an inferior court, reason on this subject? Every legal question referred to thus far, has received a judicial construction by the supreme court of this State. *Maltby v. The Reading & Columbia Railroad Co.*, 2 P. F. Smith, 140, decides that the tax now in controversy is imposed, by the various statutes cited, on corporation loans; is authorized to be retained by the act of 1864, and must be deducted from the bonds held by non-residents, as well as those residing in the State. The latter principle had been previously ruled, in effect, in *West Chester School District v. Darlington*, 2 Wright, 157.

It is said, however, that these laws impair the obligation of the contract between the debtor and the creditor. We are unable to see in what particular. All citizens are subject to taxation, either in their persons or their property, or both. Therefore, where they lend money the loan may be taxed, and if the State, by its laws, chooses to make the debtor the collector, he may be ordered to withhold the amount from his obligation. If the creditor is a non-resident of the State, his person cannot be taxed, but his money, lent to our citizens or institutions, may be, on account of the protection furnished to his claim or the property on which it is secured, and the tax be collected through the medium of the debtor. The laws tax the loan as property found here in Pennsylvania, and impose no heavier duty on it than on like property held by our own citizens. See *Maltby v. The Railroad Co.*, already cited; *Hood's Estate*, 9 Harris, 116.

We come now to consider another branch of this case. The railroad extending partly through four States, can its bonds be taxed at all? If they can, must they be taxed in full or in the proportion of the length of the road in this State? We have no express act of assembly authorizing the tax to be apportioned, yet

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

the unvarying custom of the State officers has measurably established the law against any claim to charge in full, where a large portion of the property is situated beyond our limits. It cannot be pretended that a State can by law impose a tax on that which is entirely beyond its jurisdiction, or on property to which its laws afford no protection. The custom to assess *pro rata*, to the extent of the improvement in the State, has received the sanction of the court in several cases when applied to the *stock* of corporations, and we can see no reason why the same doctrine should not prevail in regard to their bonds. The cases, we think, are strongly analogous. In *The Eastern Bridge Co. v. Northampton County*, 9 Barr. 416, Judge COULTER says: "This State can tax all that is within its bounds and which receives protection from its laws, unless exempted by the constitution of the United States or of this State." That was a tax imposed both on the stock of the company and its money at interest. The bridge was incorporated under the laws of Pennsylvania and New Jersey, and extended across the Delaware river; one-half was situated in each state, and the tax was equally apportioned. In *The Commonwealth v. The Trenton Delaware Bridge Co.*, this court held that the State of Pennsylvania could tax only one-half of the capital stock of the corporation, it being created by the laws of both States, and one-half of the bridge being in each. Pennsylvania could tax only the proportion of the property within her borders, as represented by the stock. The principal portion of the stock was owned by citizens of New Jersey, and the business of the company was transacted in that State. The decision was acquiesced in, both by the attorney-general and the corporation. See the case, reported in full in 9 Am. Law Reg. O. S. 298. Again, in the case of *The Commonwealth v. The Cleveland, Painesville and Ashtabula Railroad Co.*, 5 Casey, 370, it was held by the supreme court that "the stock of the company was subject to taxation in proportion to the amount *used* in this State." That would be evidenced by the length of the road in Pennsylvania. Fractions of time have also been recognized, though not mentioned in the statute. See 14 Wright, 399.

We are met here by a decision of the supreme court of the United States in the case of *Northern Central Railway Co. v. Jackson*, which very clearly conflicts with all of the cases cited. Jackson sued the railroad company on the coupons due him for

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

interest on his bonds. They were drawn in the usual form, payable to bearer, and the holder was a non-resident alien. The company defended as to the amount of tax paid by it to the commonwealth, but it was not allowed by the court, which held that there could be no apportionment of the tax; that Pennsylvania undertook to collect taxes from claims beyond her jurisdiction; that if she could tax, Maryland could also, which would lead to double taxation; and as many of the railroads passed through several States, each could impose the same burden, which would be most oppressive. If this case depended on the constitution or any law of the United States, we should certainly consider ourselves bound by that decision. But as we understand the subject, it must be controlled by Pennsylvania law alone, which the learned judge who delivered the opinion does not seem to comprehend. If it even resulted in double taxation, that has never been considered unlawful in this State. On the contrary it is of frequent occurrence. The real and personal property of a corporation may be taxed, although it pays a tax on the stock which purchased it; *Lackawanna Iron Company v. Luzerne County*, 6 Wright, 424, 431. See 3 Wright 251; 6 Casey, 332; 9 Barr. 361. The power of the legislature is as ample to tax twice as to tax once; 6 Casey, 332. And it is done daily, as all experience shows; 9 Barr. 361.

Equality of taxation is not required by our constitution; 7 Harria, 258. The stock may be fully taxed to the institution and also to the stockholders, *Whitesell v. Northampton County*, 13 Wright, 526, 529, and the stockholder in the corporation of another State is obliged to pay a tax to Pennsylvania on his stock, he being a resident here, although the whole property and stock is subject to taxation in the State of its location; 13 Wright, 519.

In the case reviewed in the supreme court of the United States, as in the case now on trial, there was no attempt on the part of Pennsylvania to tax property or rights beyond her jurisdiction, she did not propose to sever the bonds and say this one shall pay a tax to Maryland and that one to Pennsylvania, but she did equal justice to the creditor by saying: You shall pay your *pro rata* of the three-mill tax to us, and no more, rating it according to the length of road in each State. The same is done here. The coupons being payable out of the State, we hold to be unimportant. The officers of the corporation are held personally responsible for the tax. It can be collected from them individually if they neglect to retain and

Pittsburg, Fort Wayne and Chicago Railway Co. v. Commonwealth.

pay it over. Nor is the State bound to pursue the mortgages to recover. She can seize the road situated within her borders by sequestration, until the debt is fully paid.

The negotiable character of these coupons will not exempt them from taxation, although they pass from hand to hand like bank notes. Every person receiving one is bound to know that it is taxable by law. The statutes are public, of which all the world must take notice.

Although part of these bonds are secured by mortgage, and others are not, yet that has no bearing, for if the mortgages are not protected as to all by our laws, yet the road on which the whole debt is secured, is protected, and therefore is taxable. The hardship under which companies labor, situated like the defendant, had been strongly pressed on our consideration. Pennsylvania, through her courts, will compel the corporation to pay the tax, whilst the courts of the United States will oblige it to pay its coupons in full; thus throwing the burden of taxation on the debtor instead of the creditor, as intended by law. We do not think that this clashing of jurisdiction can be of long continuance. It is a settled principle of federal jurisprudence, that when the controversy arises on State laws, the United States court will follow the last decision of the court of final resort in the State. We consider the points raised here already decided by our supreme court. The United States court thought otherwise. When they are confessedly settled, there can thereafter be no clashing of jurisdiction. Should the supreme court of this State adopt our views, the United States judiciary must conform thereto, unless that court departs from its settled rule on the subject, or declares that the debts due to non-residents are protected from taxation by federal laws, in which case our courts must succumb.

Should the principle contended for by the defendant prevail, it must debar all taxation on railroad stocks, as well as bonds, where the road extends partly through more than one State, and as nearly one-half of all the railroads in Pennsylvania run a distance into, and often through, other States, Pennsylvania would probably be deprived of a million of dollars per annum in taxes as now assessed. Yet that apprehension should not for a moment influence the courts in declaring the law. We have made our decision irrespective of the consequences.

Erie Railway Co. v. The Commonwealth.

J. W. Simonton, for appellants.

F. C. Brewster, Attorney-General, for State.

THOMPSON, C. J. We have examined with care the charge of the court below in the case, and think it needs no discussion at our hands. We regard it as free from error, and a satisfactory explanation of the various acts of assembly and principles of law necessary to a proper decision of the case.

The case of *Maltby v. The Reading Railroad Co.* rules most of the positions assumed as errors, and fully sustains the learned judge in his charge.

That case, so far as the taxation of the capital of foreign residents is concerned, was substantially sustained by and is in accordance with *The Borough of Carlisle v. Marshall*, 12 Cas. 397; *West Chester v. Darlington*, 2 Wright, 157, and *Lewis v. The County of Chester*, 10 P. F. Smith, 325.

But as we are entirely satisfied with the opinion of the learned judge on all the questions raised below in the case and presented for his consideration, we will add nothing, but affirm the judgment for the reasons so well given therein.

The judge closes with an observation on a point of practice.

Judgment affirmed.

ERIE RAILWAY CO., appellant, v. THE COMMONWEALTH.

(66 Penn. St. 84.)

Taxation — railroad.

The Pennsylvania portion of the Erie railway was constructed under a law of that State, by which it was compelled to pay for its franchise a fixed annual sum, and to submit to taxation on its stock. *Held*, that this did not preclude the State from levying a further and general tax upon the corporation. No surrender of the general power of taxation by any legislative act can be implied.

APPEAL by the Erie Railway Company from the settlement of a tax. The case is stated in the opinion.

Erie Railway Co. v. The Commonwealth.

J. W. Simonton, for appellant. *New York & Erie Railroad v. Sabin*, 2 Casey, 242; *Iron City Bank v. Pittsburg*, 1 Wright, 340; *Commonwealth v. Philadelphia and Reading Railroad*, 12 P. F. Smith, 286; 1 Am. Rep. 399; *Gordon v. Appeal Tax Court*, 3 How. (S. C.) 133.

J. M. McClure and *F. C. Brewster*, Attorney-General, for Commonwealth. *Providence Bank v. Billings*, 4 Pet. 514; *Ohio Life & T. Co. v. Deboth*, 16 How. 417; *Gilman v. Sheboygan*, 2 Black, 510; *Bank of Pennsylvania v. Commonwealth*, 7 Harris, 144; *Academy of Fine Arts*, 10 id.; *Bank of Easton v. Commonwealth*, 10 Barr. 442; *Baltimore v. Railroad*, 6 Gill, 288.

SHARSWOOD, J. The constitutionality of the tonnage-tax having been heretofore settled by this court in *The Commonwealth v. The Philadelphia and Reading Railroad Company*,* and other cases, July, 1869, the only question which we are called upon to consider upon this record is, whether the Erie Railway Company, the plaintiffs in error, can claim any special exemption from this tax.

By the act of assembly of March 26, 1846, Pamph. L. 179, the said company, then the New York and Erie Railroad Company, were authorized "to extend the line of their said railroad from a point near the village of Port Jervis, in Orange county, State of New York, across the Delaware river into the county of Pike, and thence up the valley and near the shore of said river, within the said county, a distance not exceeding thirty miles, to a point not exceeding ten miles above the mouth of the Lackawaxen river, and there to recross the Delaware river to the easterly side thereof, in the county of Sullivan, State of New York." By the 5th section it was provided, "that after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western end with any other improvement extending to Lake Erie, said company shall cause to be paid into the treasury of this State annually, in the month of January, \$10,000; and any neglect or refusal by said company to pay as aforesaid, shall work a forfeiture of the right and privileges granted by this act," and by the 6th section, "That the stock of said company, to an amount equal to the cost of the construction of that part of their road situate in Pennsylvania, shall be subject to taxation by this commonwealth, in the same manner as other similar

* See 1 Am. Rep. 399.

property is or may be subject." These are all the provisions which are relied on to show a special exemption from taxation. It is not pretended that there is any express release of legislative power; but it is contended that, as the company have agreed to pay, and the State to accept these sums, it is necessarily implied that no more shall ever be exacted. So it might well be argued if any special taxation was imposed upon this company; for that would be to require an additional price beyond the terms of the contract. But the question, whether they shall be subject to a general tax laid upon all railroad and transportation companies in the commonwealth is an entirely different one. There is no principle better established, and it requires no long array of cases to prove it, than that no surrender of the general power of taxation by any legislative act can be implied. It must be express. *The Providence Bank v. Billings*, 4 Pet. 514; *Bank v. The Commonwealth*, 10 Barr. 442. In the case last cited, it was decided that a bank chartered under the act of 1824, which prescribed the payment of a certain tax on dividends declared, was subject to a subsequent general law, which increased the rate of taxation. "To deduce from premises so insufficient," said Mr. Justice BELL, "a consequence of such magnitude would indeed be a gross violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the State." Though a man pays to the commonwealth a price for a grant of land, which certainly implies that he shall not be specially called on to pay more, but it does not imply that his land shall not be subject to general taxation, so though a corporation has paid a sum of money for the grant of its charter, that implies no surrender of the power to tax it by a general law applicable to all corporations, though certainly it can be compelled to pay no more as the price of its privileges. Every one buys land from the commonwealth subject in his own apprehension to the great law of necessity, that he must contribute from it and all his property something to maintain the government. *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 146. If this is so, it is not easy to perceive why the purchase of a franchise by a corporation is not taken subject to the like imperious law. To call upon an individual or a corporation especially to pay an additional sum, in consequence of their being grantees of the land or the franchise, would not be taxation; it would be a taking of their property for

Erie Railway Co. v. The Commonwealth.

public use without compensation. Either in the case of the granted land or franchise it would be, beside, a violation of contract. In either view, the individual or the corporation would be constitutionally protected from it.

The case of *The New York and Erie Railroad Company v. Sabin*, 2 Cas. 242, is not as is supposed inconsistent with this view. It was there held that, inasmuch as the State, by the act of 1846, had imposed a special tax upon the stock of the company to the extent of the cost of construction, within this commonwealth, that necessarily implied an exemption of the work itself from taxes before imposed for State and county purposes; to hold otherwise would be to subject the same property to double taxation, which it cannot be supposed that the legislature intended. "If the company," said Mr. Justice WOODWARD, "should multiply buildings and accumulate lands no way appurtenant or essential to their railroad, this property would be subject to taxation like any other lands or houses; but for these erections, which are fairly included in the cost of construction of their road, they are liable to no other taxes than those specially imposed." This was really only applying to the works of this foreign corporation, the same just rule as had been settled in the construction of the general tax laws in reference to similar works of domestic corporations. *Schuylkill Permanent Bridge v. Frailey*, 13 S. & R. 422; *Lehigh Coal and Navigation Company v. Northampton County*, 8 W. & S. 334; *Railroad v. Berks County*, 6 Barr, 70; *Lackawanna Iron and Coal Company v. County of Luzerne*, 6 Wright, 424. "It sometimes happens," said Mr. Justice WOODWARD in *New York and Erie Railroad Company v. Sabin*, "that a bonus is demanded and received from a bank or other corporation at the granting of its charter, and afterward all that class of corporations are expressly subjected to another rate of taxation. No exemption of a particular institution is to be implied from the payment of the *bonus*; for that would be to set up judicial implications against an express exercise of the taxing power." Nor does *Gordon v. The Appeal Tax Court*, 3 How. (U. S.) 133, conflict with these principles. It was there held that the charter of a bank is a franchise which is not taxable as such, if a price has been paid for it which the legislature accepted; but that the corporate property is separable from the franchise and may be taxed unless there is a special agreement to the contrary. The language of a judicial opinion *arguendo* is always to be

Klumph v. Dunn.

understood in reference to the particular question presented for adjudication, which, in that case, was whether a clause in a charter, pledging the faith of the State not to impose any further tax or burden during its continuance than was therein imposed, should extend to exempt the stockholders from a tax on their stock. It evidently has no applicability to the question presented for adjudication in this case.

Judgment affirmed.

KLUMPH, appellant, v. DUNN.

(66 Penn. St. 141.)

Slander—words actionable per se. Evidence.

In an action for slanderous words spoken in Pennsylvania, and charging the commission of adultery in Georgia, *held* (1), that the words, charging an offense of moral turpitude, punishable by the law of the State where they were uttered, were actionable *per se*; and (2) that the position in life, and the family of the plaintiff, were admissible in evidence as bearing on the question of damages

ACTION of slander by James L. Dunn against Lester R. Klumph. It appeared that the slanderous words were spoken in Pennsylvania, and charged the plaintiff with the commission of adultery while in the State of Georgia; that defendant charged plaintiff, a married man, in a public store, in the presence of many persons, in the grossest terms, with open and continued criminal intercourse with a negro wench while in the army, and asserted (with an oath) that he could prove it.

The defendant insisted that as the words were spoken of plaintiff with reference to his acts while south, or outside of Pennsylvania, it must be shown that they were there criminal and in violation of law. The portion of the judge's charge alluded to in the opinion, under the 4th assignment of error, is all that is essential, and is as follows:

"This declaration does not allege the plaintiff's professional character as inducement, nor charge that the damage resulted to it. It merely recites, in parenthesis, that the plaintiff was a practicing physician and a married man; and it is proper these facts, as well as any others that relate to his character and standing

Klumph v. Dunn.

in community, should be taken into consideration by the jury. It is his character as a man that is assailed, and in that capacity he was brought suit."

Verdict for the plaintiff for \$700.

The defendant took a writ of error.

J. B. Branley and *Derrickson*, for appellant, cited *Lukehar v. Byerly*, P. F. Smith, 418; *Ruth v. Kutz*, 1 Watts, 489; *Stitzell v. Reynolds*, 9 P. F. Smith, 489; *Gosling v. Morgan*, 8 Casey, 273. The plaintiff should have shown that the offense was criminal in the place in which it was asserted to have been committed. *Barclay v. Thompson*, 2 Penn. 148; *Buys v. Gillespie*, 2 Johns. 114.

S. N. Pettis (with whom were *M. P. Davis* and *H. L. Richmond*), for appellee, cited 2 Whart. Crim. Law, §§ 2400, 2648; *Beck v. Stitzel*, 9 Harris, 522.

SHARSWOOD, J. (after disposing of a question of practice). The case of *Barclay v. Thompson*, 2 Penn. 148, decides that an action will not lie for words spoken in another State, when the offense charged is not indictable in that State, although it may be indictable here. To the same effect are *Stout v. Wood*, 1 Black. 71; *Offut v. Earlywine*, 4 id. 460; *Linville v. Earlywine*, id. 469; *Langdon v. Young*, 33 Vt. 136. The reason is a very plain one. The defendant committed no legal wrong where the words were spoken. No action lay there, and, therefore, not in any other State in which the defendant might afterward be found and sued. In this case, however, the words were spoken in this State. It has often been held that where the words impute a common-law offense to have been committed in another State, it need not be affirmatively proved that such offense is indictable there. The presumption is, that the common law of a sister State is similar to our own, and in one case it is intimated, though not decided, that if the offense charged derives its quality as a crime from the statute alone, the rule would be otherwise. *Johnson v. Dickens*, 25 Miss. 580; *Van Ankin v. Westfall*, 14 Johns. 233; *Poe v. Green*, 3 Sneed, 664; *Montgomery v. Dealy*, 3 Wis. 709. But after a careful search, I find no case which directly holds that words charging an offense of moral turpitude, and indictable by the statute law of the country where they are uttered, are not actionable *per se*, because they state the offense to have been

Klumph v. Dunn.

committed in another country. The opinions in some of the cases cited, seem to rely upon the liability of the defendant to extradition under the constitution of the United States, or treaties with foreign States. But that surely is not the true *ratio decidendi*. Nothing seems to be better settled than that liability to prosecution or punishment is not the criterion. Both ancient and modern cases agree in this.

In *Carpenter v. Tarrant*, Ridg. temp. Hardw. 339, the words were: "Robert Carpenter was in Winchester gaol and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A., and stealing his bacon." Here the words necessarily imported that the plaintiff had been tried and acquitted, and therefore could never be convicted of the same offense. In *Gainford v. Tuke*, Cro. Jac. 336, the words were: "Thou wast in Launceston gaol for coining." The plaintiff replied: "If I was there, I answered it well." "Yea," said the defendant, "you were burnt in the hand for it." Here the words clearly meant that the plaintiff had been tried, convicted, pleaded his clergy and been burnt in the hand, and, of course, could not be again punished for the same offense. So in *Baston v. Tatham*, Cro. Jac. 622, it was held to be no defense to prove that the offense charged was within the terms of a general pardon, for the court remarked that although the pardon might discharge of punishment, yet the scandal of the offense remained. It may be said that in these cases there was liability to indictment on the charge, though the plaintiff, by pleading, could prevent conviction and punishment. It is to be remarked, however, that in all of them the slander carried its antidote with it as far as risk of indictment was concerned. They are distinguishable in this respect from that class of decisions where the *corpus delicto* is shown never to have existed; as where the words were "you have killed Rob Waters; you have poisoned him, and I can prove it," and it appeared by the plaintiff's witnesses that at the time when the words were spoken, Rob Waters was alive in a distant part of the country. *Eckart v. Wilson*, 10 S. & R. 44; *Deford v. Miller*, 3 Penn. 103; *Colbert v. Caldwell*, 3 Grant, 181. There are other cases, however, in which there could be no pretense of risk of prosecution. In *Fowler v. Doudney*, 2 Moo. & R. 119, Lord DENMAN ruled these words to be actionable: "He is a returned convict," as importing that the punishment had been suffered, but the infamy remained. There was here no charge

that the plaintiff had been guilty of any particular offense, so that it could not be said that he ran any risk in consequence of the slander of being subjected to another prosecution. Such was the determination of this court in *Smith v. Stewart*, 5 Barr. 372, in which the words were "that man was in the penitentiary of Ohio." Here there was neither liability to punishment nor prosecution growing out of the charge, which was that the plaintiff had committed some crime for which he had already been punished in the penitentiary; yet the words were held to be actionable *per se*.

What then is the criterion? Mr. Starkie, after an elaborate review of the cases, comes to the conclusion that as it is necessary to have some clear and certain rule by which the line of demarcation between actionable and non-actionable words can be drawn, none could be adopted more convenient than that which refers the question to the criminal law, and confines the action to imputations of offenses of moral turpitude, punishable in the temporal courts. 1 Starkie on Slander, 27.

But to what law are the courts to refer to ascertain whether the offense charged is of this character? Upon every principle of reason and policy the answer seems to be the law of the country where the words are spoken. That law is the exponent of the moral sense of that community—of the estimation in which they hold offenses against the moral law, and words which accuse a man of any crime, condemned and subjected to infamous punishment by that law, expose him in that community to obloquy and contempt. The moral character of the act cannot be affected by the place where it is committed. What matters it to those to whom the words are addressed, or in whose hearing they are spoken, that the crime is charged to have been committed in a State or country where such actions are not subject to punishment? Even if they are to be presumed to know that the act was not a crime punishable by the law of the country where it was alleged to have been committed, would it any the less injure the moral character and standing of the party charged? Is it possible that a man living in Pennsylvania can be accused of having committed the crime *inter christianos non nominandum* upon some uninhabited coast or island where there is no government and no law, or among some barbarous people where such practices may be, as they have been, tolerated? Is such a plaintiff to be turned out of court unless he can prove some special damage? This may be an extreme case, but nevertheless it tests

Klumph v. Dunn.

the principle. If the criminal code laid its heavy hand upon such calumniators, there might be some good reason for requiring special damage to be shown in all actions of slander, but we know that it does not, and unless the lash is placed in the hands of the injured party they must go "unwhipped of justice."

If the evidence of the plaintiff's witnesses was to be believed, the defendant below charged him in a public store, in the presence of many persons, in the grossest terms, with open and continued criminal connection with a negro wench, and asserted with an oath that he could prove it. By the law of Pennsylvania, from 1705 to the present time, adultery has always been an indictable offense, and of its moral turpitude there can be no question. The plaintiff was a married man—the defendant knew him to be so, and meant to charge him with this offense, and in language which was designed to convey his own sense of its detestable character, especially no doubt in view of the race and color of the party who was alleged to have been a partaker in the crime. We are of the opinion that the words were actionable *per se*, whether they were limited to the State of Georgia or were general; and that the plaintiff in error has no just ground of complaint with the answer and charge of the court below in this respect.

The fourth error assigned remains to be noticed. It is true, as decided in *Chubb v. Geell*, 10 Casey, 115, that in an action of slander the plaintiff cannot introduce evidence as to his good character until it has been attacked by the defendant; for until then the law presumes it to be good, and the defendant admits it. Surely the jury may weigh the fact that the character and standing of the plaintiff is unimpeached in estimating the damages. But the court told the jury that they might also take into consideration that the plaintiff was a practicing physician, although the declaration did not allege his professional character as an inducement, nor charge that the damage resulted to it. The position in life and the family of the plaintiff are always important circumstances as bearing upon the question of damages, and have always been held to be admissible in evidence for that purpose. *Beehler v. Steever*, 2 Whart. 313. It was not necessary that they should be specially laid as the ground of recovery in the declaration. Evidence of these particulars was given without objection, and it would have been error to have instructed the jury that they ought to disregard them.

Judgment affirmed.

 Pennsylvania Railroad Co. v. Riblet.

NOTE.—That plaintiff cannot introduce evidence of good character until his reputation is assailed. See *Severence v. Hilton*, 4 Foster, 147; *Harcourt v. Harrison*, 1 Hall, 474; *Cornwall v. Richardson*, 1 Ry. & M. 815; *Shipman v. Burrows*, 1 Hall, 399; *McGee v. Sodusky*, 5 J. J. Marsh, 185; *Inman v. Foster*, 8 Wend. 602; *Dame v. Kenney*, 5 Foster, 318; *Holley v. Burgess*, 9 Ala. 728; *Petrie v. Ross*, 5 Watts & Serg. 364; *Miles v. Van Horn*, 17 Ind. 245. See, however, to the contrary, *Ilyrket v. Monahan*, 7 Blackf. 83; *Scott v. Peebles*, 2 Sm. & M. 516. Nor can the plaintiff introduce evidence of good character in reply to evidence tending to prove the charge. *Houghaling v. Kilderhouse*, 1 N. Y. 530; affirming same case, 2 Barb. 149; *Mathevos v. Huu Iley*, 9 N. H. 146; *Springstein v. Field*, Anthon, 185; *Stone v. Converse*, 3 Conn. 325.—REP.

 PENNSYLVANIA RAILROAD Co., appellant, v. RIBLET.

(66 Penn. St. 164.)

Railroad company—fences. Constitutional law.

A railroad company was not compelled by its charter to make or rebuild fences along its track. By an act of the legislature it was made the duty of the company to repair fences along its line, "destroyed by fire caused by the running of trains or by the employes of the road." *Held*, a valid exercise of the police power of the State.

ACTION by Riblet against the Pennsylvania Railroad Company to recover a penalty imposed by the acts of the legislature of March 23 and April 23, 1868. "To secure farmers against losses, caused by railroads in Erie county" and providing (among other things) "that in all cases where fences along the line of any railroad are destroyed by fire caused by the running of trains or by the employes of any railroad, the said railroad company shall be liable to the penalties specified" in the acts. It appeared that plaintiff owned a farm along the line of defendant's railroad in the aforesaid county of Erie; that there were fences along the track which were destroyed by fire communicated by defendant's locomotive; that defendant refused to rebuild or repair the fences within the time required by law. This suit was brought originally in the justices' court, where judgment was rendered for the penalty, \$50. On appeal to the court of common pleas, there was a verdict for plaintiff, subject to the opinion of this court as to the constitutionality of the acts imposing the penalty. Defendants took out a writ of error, and the cause was removed to the supreme court.

J. R. Thompson, for appellant, cited *Meadville v. The Erie Canal Co.*, 6 Harr. 66; *The City of Erie v. The Erie Canal Co.*, 9 P. F. Smith, 174; *Brown v. Hummel*, 6 Barr, 86.

 Pennsylvania Railroad Co. v. Riblet.

W. Benson, for appellee. *Angell & Ames on Corp.* § 265 *et seq.*; *Thorpe v. Rutland & B. Railway*, 27 Vt. 140; *State v. Noyes*, 47 Me. 189; *Madison and Indianapolis Railroad Co. v. Whitenck*, 8 Ind. 217; *New Albany and Salem Railroad Co. v. Tilton*, 12 id. 310; *Indianapolis and Cincinnati Railroad Co. v. McAhren*, id. 552; *Iowa v. Galena, etc., Railroad Co.*, 16 Iowa, 6; *Bulkly v. New York, etc., Railroad Co.*, 27 Conn. 479; *Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer and Saratoga Railroad Co.*, id. 390; *Talmage v. Rensselaer and Saratoga Railroad Co.*, 13 id. 493; *Abbot's Digest of Law on Corporations*, 643, § 381; *Boston, Concord and Montreal Railway v. State*, 32 N. H. 215; *Dartmouth Coll. v. Woodward*, 4 Wheat. 518; *Moore v. Veasie*, 32 Me. 343; *Providence Bank v. Billings*, 4 Pet. 514; *Easton Bank v. Commonwealth*, 10 Barr, 442; *Peters v. Iron Mountain Railway*, 23 Miss. 107; *Lyman v. Boston & W. Railroad*, 4 Cush. 288; *Hepburn v. Curtis*, 7 Watts, 300; *Schenly v. The Commonwealth*, 12 Cas. 29-57; *Biddle v. Starr*, 9 Barr, 467; *The Pittsburg Turnpike Co. v. The Commonwealth*, 2 Watts, 433; *Taggart v. McGinn*, 2 Harr. 157; *Sands v. Tillinghast*, 11 Ind. 543; *Camden and Amboy Railroad Co. v. Briggs*, 2 Zab. 623.

SHARSWOOD, J. It appears to be well settled that without some provision in their charter to that effect, a railroad company is not bound to make or maintain fences along the line of their track. 1 *Redfield on Railways*, 482; *Railroad Company v. Skinner*, 7 Harr. 298. It may be conceded that it would not be within the constitutional power of the legislature to impose such an obligation on any existing company; at all events, not on any company whose charter antedates the amendment to the constitution of 1854 and contains no reservation to the legislature of the right to alter or amend it. The plaintiffs in error succeeding to all the rights of the Philadelphia and Erie Railroad Company, which was incorporated by an act of April 3, 1837, Pamph. L. 170, by the name of the Sunbury and Erie Railroad Company, and in which there is no such reservation, undoubtedly occupy this position. For the State now to attempt to impose any new burdens in addition to those provided in the charter would be for one party to add a new term to the contract without the consent of the other, and that would impair or make it worse as the word imports. *City of Erie v. Erie Canal Company*, 9 P. F. Smith, 174. It may also be conceded for the sake

of the argument that it would not be in the power of the legislature to enlarge the common-law liabilities of such incorporated bodies for injuries to others, either as common carriers of passengers or merchandise, or as grantees of a right of way over the lands of others; at least, unless by some law or rule of general application to all persons, natural or artificial. We need express no opinion however upon so important a question here, as it is not involved in this case. We may agree that the legislature could not make such a company liable to answer in damages for barns, houses or other improvements destroyed by sparks from their locomotives without negligence in them, their agents or servants. These would be mere questions of private right between the parties, in which strangers or the public at large would have no interest. The constitutionality of the proviso of the act of April 13, 1868, Pamph. L. 1022, does not depend upon a denial of any of these concessions. It rests upon other and entirely different principles. It may be true that the obligation to make and maintain the fences along the road is on the landowner. If they fall to decay, are broken down by cattle or other trespassers, or are destroyed by fire, generally they are bound to repair. The act in question indeed makes it the duty of the railroad company in the first instance to repair "in all cases where fences along the line of any railroad are destroyed by fire caused by the running of trains or by the employes of any railroad," and to do it promptly, under the penalty prescribed by the act of March 23, 1868, Pamph. L. 424. I am careful in the use of these words "in the first instance," because, as will be mentioned presently, we have nothing to do with any question of ultimate responsibility for the expense of the reparation. It is true that this duty is not imposed upon the company in cases only where the destruction was caused by negligence, but absolutely without any regard to that question. Hence the contention on the part of the plaintiffs in error that the act is unconstitutional and void.

Above and beyond any question between the landholder and the railroad company as to their respective rights and obligations, is that of the public safety. For that it is the duty of the legislature to provide; and for this purpose they are vested with all the legislative power of the commonwealth. By the escape of cattle through breaches occasioned by the burning of fences, the lives of thousands of human beings traveling on the railroad may be in constant peril. Mr. Redfield says well that "the building of fences along the line

Pennsylvania Railroad Co. v. Riblet.

of a railway track is, no doubt, in regard to the security of travel, to be regarded as a matter of police. 1 Redf. 496. In the opinion of the supreme court of Indiana, in *The New Albany and Salem Railroad Company v. Tilton*, 12 Ind. 3, carrying the principle much further than we are asked to do in this case, it is said: "When power is granted to organizations to prepare ways for carrying passengers from point to point with great celerity, but by the application of a propelling agent of known danger and almost irresistible power, it would appear but reasonable that a right should be lodged somewhere to maintain over such organization a supervisory control, by which they might be compelled, under penalties, to adopt appropriate means, when discovered, of lessening the great danger arising from the use of such agent and mode of conveyance. Such would be a police regulation—a regulation for the protection of the public." It cannot, I think, be doubted that the legislature could compel the landholder, under penalties, promptly to repair his fences, even where the destruction is caused by the negligence of the railroad company, or of others, leaving him to his legal remedy to recover his damages from those ultimately responsible. If so, they must have the same right to impose that duty upon the railroad company when the destruction has been caused by their act, even without fault or negligence on their part. I do not understand the provisions of the act in question to settle the ultimate responsibility of either party. That question does not arise in this case, and it is not meant to express any opinion upon it. It may well be doubted whether it would be in the power of one legislature by express contract to tie the hands of any succeeding legislature from the exercise of any necessary power of providing for the public safety. That would be to alienate a trust confided to them for the public good. But in this case they have never undertaken to do so. It is urged indeed that the act before us was not passed for this purpose, but, as its title expresses, "to provide for cases where farmers may be harmed by such railroad companies," and it is contended that this shows conclusively that it was the design of the legislature to impose this new burden upon the railroad company for the benefit of the landholders and not for the security of the traveling public. The title of an act since the first amendment of the constitution of 1864 must now be regarded as a part of it, however it may have been before. But that is important rather upon a question of construction than of power. We cannot

Rhines' Administrators v. Evans.

try the constitutionality of a legislative act by the motives and designs of the lawmaker, however plainly expressed. If the act itself is within the scope of their authority it must stand, and we are bound to make it stand if it will upon any intendment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.

Judgment affirmed.

RHINES' ADM'RS, appellants, v. EVANS.

(66 Penn. St. 198.)

Statute of limitations. Attorney—collection of bills.

An attorney gave a receipt for a note which he agreed to collect. In an action to recover for neglecting to collect the note, *held*, that the statute of limitations did not begin to run from the date of the receipt, but from a reasonable time afterward for beginning proceedings, and that seventeen months was more than a reasonable time.

ACTION by the administrators of A. S. Rhines, deceased, against J. B. Evans, to recover for the neglect of defendant to collect a note placed in his hands for that purpose. The case is stated in the opinion.

G. R. Jenks, for appellants, cited *Zacharias v. Zacharias*, 11 Harris, 454; *Morrison v. Mullin*, 10 Casey, 17; *Vanhorn v. Scott*, 4 id. 317; *Foster v. Jack*, 4 Watts, 340; *McCoon v. Galbraith*, 5 Casey, 295; *McDowell v. Potter*, 8 Barr. 190; *Glenn v. Cuttle*, 2 Grant, 273; *Campbell v. Boggs*, 12 Wright, 526.

AGNEW, J. On the 10th of February, 1858, J. B. Evans, Esq., gave his receipt to A. S. Rhines for a due-bill on Lukins & Beeson, of Rochester, Pa., dated October 30, 1857, for \$365, for collection. Evans is called attorney in the paper-book; but whether he is an attorney-at-law does not appear, and is perhaps not very material. *Campbell v. Boggs*, 12 Wright, 524. So far as we learn from the paper-book, nothing whatever appears to have been done by Evans

toward the collection of the money. It appears, however, from the testimony of Lukins, that there was an understanding that the due-bill might be renewed in the following spring by a note; and Lukins & Beeson actually gave their note at four months, dated May 13, 1858, for \$372.30, payable to the order of A. P. Rhines at the Merchants' and Manufacturers' Bank of Pittsburg. J. S. Piehl, the person who called on Lukins & Beeson and got the new note, acted without authority, and did not surrender the due-bill, for the reason, probably, that it was in the possession of Evans. The new note was indorsed by John A. Myler, as he says, as an accommodation indorser, and was paid by Lukins & Beeson at maturity. Lukins & Beeson considered themselves absolved from further liability, and Lukins, who was examined in 1869, said that they, Lukins & Beeson, would take any legal means to prevent collection. The statute of limitations was then a protection to them. During all this time we hear nothing of Evans, and of nothing done by him to collect the due-bill. This action is assumpsit, brought by Rhines against Evans on his undertaking of the 10th of February, 1858, and was commenced on the 27th of July, 1865. The court below held that the action was barred by the statute of limitations, and this is the only error assigned. How the second note came to be paid at the bank without the indorsement of Rhines, to whose order it was drawn, does not appear; but it is presumable, if it had been indorsed by him or by his authority, Evans would have shown it, and thus absolved himself. As the case stands, then, Evans took no step whatever to collect the due bill of \$365, and Rhines has lost his money. Under these circumstances, when did the statute of limitations begin to run? All the authorities agree in this, that it began when the cause of action first arose — that is, when Evans first became liable to Rhines for neglecting to collect the money; *Campbell's Adm'rs v. Boggs*, 12 Wright, 524; *Downye v. Garard*, 12 Harris, 52; *Morrison's Adm'rs v. Mullin*, 10 Casey, 17; *Barton v. Dickens*, 12 Wright, 518. But when did Evans become liable to Rhines for a neglect of duty? It is clear he did not at the date of the receipt, for that would allow no time to perform the duty. Clearly a reasonable time must be allowed to begin. The attorney must be invested with some discretion in the absence of peremptory instructions. As remarked by the present chief justice, *Morrison's Administrator v. Mullin*, *supra*, "to give effect to the spirit of the statute, the law

sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued, by the diligence required of the party. When the time for doing an act necessarily precedent to bringing a suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins."

What is a reasonable time is a question most frequently dependent on circumstances, and therefore to be submitted in such cases to the jury. In the case of *Livingston v. Cox*, 6 Barr, 360, a suit against an attorney for neglect of duty, six months' failure to commence a suit against a debtor in failing circumstances seems to have been held an unreasonable time, and the plaintiff Cox recovered against Livingston. And where the duty is immediate, as in the collection of money, the right of action accrues and the statute begins to run from the time of the attorney's receipt of the money, even though he gives no notice of its collection, the law deeming it gross negligence on part of the creditor to neglect to make inquiry for six years, unless the attorney has been guilty of concealment or of some act to put his client off his guard. Such is the modern doctrine, qualifying and to some extent overruling *McDowell et ux. v. Potter*, 8 Barr, 189, and some previous cases. See *Campbell's Administrator v. Boggs*, 12 Wright, 524; *Downey v. Garard*, 12 Harris, 52, and authorities therein cited. The same duty of diligence on part of the creditor to prevent the bar of the statute, is to be found in analogous cases; as where a call for installments under a subscription to stock is necessary; *Railroad Co. v. Byers*, 8 Casey, 22. See also *Morrison v. Mullin*, *supra*. Let us examine, then, in view of these principles, the facts of the case before us. Evans received the note for collection on the 10th of February, 1858, and this suit was not commenced against him until seven years and five months had elapsed. Was the period of one year and five months sufficient to enable the court to say, as a matter of law, that the delay by Evans for that time to take any steps toward collection was unreasonable? Doubtless it was in the power of Rhines to show, if the facts were so, that during this time Evans had proceeded diligently, and that the lack of diligence occurred afterward during the period of the remaining six years; or to show that Evans had given him false information or otherwise misled him, and thus to prevent the bar of the statute. But as the case stands before us, Evans did

Rhines' Administrators v. Evans.

nothing whatever, and Rhines remained quiescent during this whole period of seven years and five months. Under these circumstances what was to be left to the jury? There were no facts, no circumstances to enable them to determine the reasonableness or unreasonableness of the delay except the mere lapse of time, and this was fully within the knowledge of the court. It became, therefore, a question of law for the court to decide, and surely it is not a difficult question to determine, for no one could assert that it is reasonable the attorney should delay seventeen months without taking a step; or that the creditor should delay seven years and five months without making an inquiry or bringing a suit.

The plaintiff in error contends that the understanding testified to by Lukins, that Lukins & Beeson were to have an extension of time on the due-bill and the giving of the new note which fell due on the 13th September, 1858, were a sufficient excuse for the delay until September, 1858, leaving but ten months intervening before suit brought, and that this is not an unreasonable time to delay before proceeding to collect the money. But there is no evidence that the fact of the renewal was known either to the plaintiff or the defendant, or that the defendant was postponed by it. Had the plaintiff consented to it, that of itself would have discharged the defendant, for the renewed note was paid at maturity. If the renewed note had anything to do with Evans' delay in proceeding on the original due-bill, it does not appear, while if he had taken prompt steps the new note would have been discovered, and if given by Lukins & Beeson without the plaintiff's authority, they could have been pursued on the due-bill in time to prevent the claim of the plaintiff against them from being barred by the statute of limitations. From these views it is evident that the judgment of the court must be affirmed, not, however, because the statute began to run from the date of the receipt, but because the negligence of Evans was so great, that, standing unredeemed by any facts or circumstances in the case, the court was bound to say to the jury that the period of delay of seventeen months was unreasonable, and the statute had barred the plaintiff's action before he began his suit.

Judgment affirmed.

Armstrong County v. Clarion County.

ARMSTRONG COUNTY, appellant, v. CLARION COUNTY.

(86 Penn. St. 218.)

Highway — contribution among wrong-doers — municipal corporation.

Where a person is injured in passing over a defective bridge, which two counties are jointly bound to keep in repair, and recovers judgment of one county, the other is liable to contribution.

The rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act.

ACTION by the county of Armstrong against the county of Clarion. The opinion states the case.

F. Mechling, G. W. Lathey and D. Barclay, appellant, cited 1 Story's Eq. Jur. § 463, note; 1 Pars. on Cont. 31; *Erie v. Schwingle*, 10 Harris, 388; 1 Pars. on Cont. 37, note 10; *Adamson v. Jarvis*, 4 Bing. 66; *Humphrey Co. v. Armstrong*, 6 P. F. Smith, 204; *Worty v. Batte*, 2 C. & P. 417; *Horbach's Administrators v. Elder*, 6 Harris, 33.

W. L. Corbett, for appellee, cited *Merryweather v. Nixan*, 8 Term. R. 186; *Betts v. Gibbins*, 2 Ad. & Ellis, 74; *N. Penn. Railroad v. Mahoney*, 7 P. F. Smith, 189.

READ, J. The bridge across Red Bank creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell, and he was severely injured; he brought suit for damages against the county of Armstrong; and on the trial, under the charge of the court, there was a verdict for defendant. This was reversed on writ of error (6 P. F. Smith, 204), and upon a second trial there was a verdict for the plaintiff for \$1,100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong county, and the present suit is to recover contribution from Clarion county. On the trial the learned judge nonsuited the plaintiff on the ground that one of two joint wrong-doers cannot have contribution from the other.

Armstrong County v. Clarion County.

The commissioners of the two counties had examined the bridge in the summer, and ordered some repairs, which were made. There can be little doubt that, morally, Clarion county was bound to pay one-half of the sum recovered from and paid by Armstrong county; and the question is, does not the law make the moral obligation a legal one? *Merryweather v. Nixan*, 8 Term. R. 186, the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In *Colburn v. Patmore*, 1 Cr. M. & R. 73, the proprietor of a newspaper who, for a libel published in it, was subjected to a criminal information, convicted and fined, sought to recover from his editor, who was the author of the libel, the expenses which he had incurred by his misfeasance; Lord LYNDHURST said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."

So in *Arnold v. Clifford*, 2 Sum. 238, it was held, a promise to indemnify the publisher of a libel is void. "No one," said Judge STORY, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice."

In *Miller v. Fenton*, 11 Paige, 18, the wrong-doers were two of the officers of a bank, who had fraudulently abstracted its funds, and, of course, there could be no contribution between criminals. In the case of *The Attorney-General v. Wilson*, 4 Juris. 1174, cited in the above case by the chancellor, and also reported in 1 Craig & Phillips, 1, where it was contended that all the persons charged with the breach of trust should be made parties, Lord COTTENHAM said: "In cases of this kind, where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is, therefore, not necessary to make all parties who may, more or less, have joined in the act complained of." *Seddon v. Connell*, 10 Sim. 81, is to the same effect.

In Story on Part. § 220, after speaking of the general rule that there is no contribution between joint wrong-doers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire

Armstrong County v. Clarion County.

innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be, and properly is, a contribution allowed by law for such payments and expenses between constructive wrong-doers, whether partners or not." The case of *Adamson v. Jarvis*, cited by the learned commentators, is in 4 Bing. 66, in which Lord Chief Justice BEST, after noticing *Merryweather v. Nizan*, says: "The case of *Phillips v. Biggs*, Hard. 164" (which was on the equity side of the exchequer), "was never decided; but the court of chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.

"From the inclination of the court in this last case, and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nizan*, and from reason, justice and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act."

In *Betts v. Gibbins*, 2 Ad. & E. 57, Lord DENMAN said, "The case of *Merryweather v. Nizan*, 8 T. R. 186, seems to me to have been strained beyond what the decision will bear—the present case is an exception to the general rule. The general rule is, that between wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and *Merryweather v. Nizan*, 8 T. R. 186, was only a refusal of a rule nisi."

"In *Adamson v. Jarvis*, 4 Bing. 66, we have the observations of a learned person familiar with commercial law."

A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid; *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154.

In *Pearson v. Skelton*, 1 Mee. & Wels. 504, where one stage-coach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there, no contribution between joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

Gray & Bell v. Scott and Wife.

The same doctrine was maintained in *Wooley v. Batte*, 2 C. & P. 417.

These cases have been followed in this court in *Horbach's Administrators v. Elder*, 6 Harris, 33. "Here," said Judge COUTLER, "the plaintiff and defendant are *in equali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share."

"Contribution," says Lord Chief Baron EYRE, in *Dering v. Earl of Winchelsea*, 1 Cox, 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties plaintiff and defendant are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other.

Judgment reversed, and venire de novo awarded.

GRAY & BELL, appellants, v. SCOTT AND WIFE.

(66 Penn. St. 345.)

Contributory negligence.

A boy was warned off a gangway because it was a passage for laborers to pass through with iron, trucks, wheelbarrows, etc. He was subsequently in the gangway, when he was killed by the falling of a car negligently pushed off a tramway overhead. *Held*, that he was not guilty of contributory negligence, there being no reason to expect danger from the cars above.

ACTION by Scott and wife against Gray & Bell to recover damages for the death of plaintiffs' son by defendants' negligence. It appeared that the place of the accident was the yard near a rolling-mill, owned and operated by J. Painter, & Co., and in which defendants had been employed in delivering coal. The coal was run in on a private railroad belonging to Painter, and which the defendants were bound to keep in repair. Underneath this rail-

Gray & Bell v. Scott and Wife.

road or tramway was a passage way, through which workmen were accustomed to pass with iron, trucks, wheelbarrows, etc.

Plaintiffs' son, with others, had been warned off this passage, or gangway, by the Painters, on account of the danger which they apprehended from the use of it by the workmen. (The Painters testified that they had not thought of danger from the cars above.) On the day of the accident plaintiffs' son was in the gangway, when he was killed by the falling of a car negligently pushed (by defendants) off the tramway above. The defense to this action was, that the boy was guilty of contributory negligence, which was embodied in defendants' sixth point, and which the court refused.

Verdict for plaintiff for \$718. Defendant appealed.

C. S. Fetterman, for appellants, cited *Shearman & R. on Negligence*, 28 and 51, note 2; 55, note 2; *Oakland Railroad Co. v. Fielding*, 12 Wright, 320; *Balfourd v. Boud*, 30 Jur. 124; *Burke v. Broadway Railroad*, 49 Barb. 529.

A. Kerr, for appellees, cited *Reeves v. Del. Lack. & W. Railroad*, 6 Casey, 454; *Brown v. Lynn*, 7 id. 510; *Penn. Railroad v. Kelly*, id. 372; *Rauch v. Lloyd*, id. 358.

THOMPSON, C. J. We think it would have been manifest error had the learned judge affirmed the defendants' sixth point. To have done so, would have been to impute negligence to the plaintiffs' son, in not regarding a warning of danger from a cause entirely different from that by which he lost his life. The Painters warned the boys, the deceased and others, off the the gangway, because it was a passage for laborers and workmen to pass through with iron, trucks, wheelbarrows, etc.; it was on account of this kind of use of the passage way that they considered it dangerous. Jacob Painter says he "did not expect danger from whence it came, but from wheelbarrows," etc.; "never thought of danger from cars." The cars were overhead, and there was no possible danger from them where the boy was killed, unless they were pitched off the tramway and fell on somebody below. This was not anticipated by the Painters or anybody else. There could be no danger from this source unless from inevitable accident, recklessness or carelessness. That there was negligence on part of the defendants below, in not sufficiently securing their tramway so as to stop the headway

Tilton v. Miller & Co.

of their cars, was scarcely denied, and that this was the occasion of the cars going overboard and killing the boy, is undeniable. But because he was under the tramway in the passage below, it is thought he was guilty of contributory negligence. He could not be guilty of negligence as to the defendants, without there was some reason to expect danger, and a duty of care on his part in relation to it. There was ordinarily none. He had a right, therefore, to suppose everything secure and safely managed on the tramway, and because it was not, he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of fire-arms discharged a hundred yards off. If he had a moment's leisure to amuse himself in the interim of his labor, and did so where he had no reason to expect danger, the fact that he did so was, of itself, no evidence of negligence on his part. We think that the plea of contributory negligence was not made out by the testimony referred to in the point, and the court did right in refusing it.

Judgment affirmed.

TILTON, appellant, v. MILLER & Co.

(66 Penn. St. 388.)

Contract. Evidence. Sample and imitation.

IN an action to recover the purchase money of an article made under contract, the defense was that the article was not like the sample. *Held*, that evidence was admissible of the difference in the results produced by the sample and the imitation, as corroborative of their inherent difference.

ACTION in assumpsit by Miller & Co. against Tilton. It appeared that the defendant wrote to plaintiffs requesting them to make "1,000 dozen O gas generators, as per sample, at two dollars per dozen; also tools for No. 1 gas generator burner, as per sample shown, at regular prices for making tools." Accordingly, plaintiffs manufactured and delivered a portion of the articles, which the defendant would not accept, alleging that they were not like the contract sample. This action was brought to recover the value of the articles so made and delivered. The defendant, after introducing evidence to show the difference between the contract sample and the

manufactured articles, offered to show that the articles would not produce the effects which the contract sample would do. But this evidence was rejected by the court. The exception to this ruling is the principal one considered in the case, and is the only point necessary to an understanding of the opinion of the Supreme Court. Verdict for plaintiff; appeal by defendant.

T. Schoyer, and *C. B. M. Smith*, for appellant.

J. H. Hampton (with whom was *A. H. Miller*), for appellee, cited on the 17th error: Addison on Contracts, 231; *Ollivant v. Bayley*, 5 Ad. & Ellis, N. S. 288; *Chanter v. Hopkins*, 4 M. & W. 399; *Carmac v. Warriner*, 1 C. B. 356; *Mason v. Chappel*, 15 Grattan, 72; *Misner v. Granger*, 4 Gilman, 69; *Getty v. Rountree*, 2 Chandler, 28; *Brown v. Murphee*, 31 Miss. 91; *Kellogg v. Denslow*, 11 Conn. 411.

AGNEW, J. A careful examination of the sixteen errors assigned to the charge of the learned judge of the district court, and his answers to the points, brings to light no material error in his instruction to the jury. An elaboration of authorities to a jury is not useful, and sometimes tends to confuse, but here the judge so clearly stated the points for the attention and examination of the jury, that it does not seem probable they could have been misled by the detailed reference to authorities. It is not necessary that a judge should encumber his charge with a discussion of the law, but rather to give definite instructions to the jury; the act of assembly allowing him to furnish his reasons, which he may always subjoin if explanation be necessary.

This was a contract to make 1,000 dozen of gas generators, *as per sample*, at \$2 per dozen. The judge was therefore clearly right in instructing the jury to ascertain first what was the contract sample. There was evidence tending to show that alterations had been made in the sample, at the request of the defendant. He was therefore right also in directing the jury to ascertain from the evidence whether the sample was so altered, and if so, what the alterations were, and thus to arrive at the true contract sample; the model by which the plaintiffs were to make the gas generators called for by their contract. He was right in directing them to determine upon the evidence whether the gas generators made by them for the

Tilton v. Miller & Co.

defendant corresponded with the sample, and if they did, the plaintiffs thereby fulfilled their contract and were not responsible for the result; that is, for the operation of the generator. They did not contract to make an article which would produce a certain result, but only to make one to correspond exactly with the proposed model. If this were done fully and fairly, their whole duty was performed, and they had a right to recover for so many as they had made and delivered according to their contract.

Admitting, then, the correctness of this instruction, and that the learned judge was right in ruling that correspondence between the article made and the sample was the true and only question, and that the maker is not liable for the result expected to be produced, was he right in his rulings on the evidence? Is there no difference between the liability of the maker for this result, and the evidence which the result affords of a want of correspondence between the thing made and the model? Clearly there is a marked distinction between the propositions. A result or effect produced may be most convincing corroborative evidence of a difference between the model and the imitation. Especially is this true of those things which lie out of the range of ordinary observation, and are known only to experts. The expert may be called to prove the actual difference, but when this is done, it does not follow that the legal measure of proof is full. A fact which directly proves the truth of an assertion may undoubtedly be adduced to corroborate and confirm it. If an expert state a fact which cannot be appreciated by ordinary observation, and state it to a body of unskilled men (such as a jury is), the force of his statement depends wholly upon his skill and his credibility, and has nothing in the common sense of the jury to confirm it. When he declares that there is a material and substantial difference between two subjects of comparison, and if one of them will produce a desired and expected effect, and the other will not, why shall not this practical test of the difference, to wit, the result produced by each, be given in evidence to corroborate and confirm his statement? It is no answer to say that the maker is not liable for the result of an article he makes according to the model, for that is not now the question. The question is, did he make it in conformity to his model, and clearly its power to perform the same result as the model, is evidence tending to show he did so make it, while its want of power to do so, is evidence tending to prove the contrary.

If a delicate piece of mechanism, such as a watch having a certain movement, be the model, and can be shown to run well, and if the imitation watch be proved to differ from the model in certain respects, alleged to be essential to its successful operation, why shall the party not be permitted to show in corroboration of these departures from the model, that the imitation watch will not keep time, or will not run at all? Can anything be more corroborative of the skill and truthfulness of the witness who asserts these differences between the watches? Such is the precise case before us. Here is a gas generator intended to produce a certain effect upon a subtle fluid, and to convert it into gas by means of heat; an article unknown to the jury, peculiar in its structure, and whose laws of action, even an expert may find it difficult to explain. Why should not the party, after showing departures in form and structure in the imitation from the model, be permitted to show that the model will produce a certain effect which the imitation will not? Is it not strong evidence that the differences pointed out are real and substantial, and therefore not to be overlooked and disregarded by a jury, who may not, for want of skill in the particular matter, be able to discern the deviation of the imitation from the sample. The defendant below made several offers of evidence to prove by the results the difference between the sample and the generators manufactured by the plaintiffs, all of which were overruled by the court on the general ground of incompetency and irrelevancy. The one set forth in the seventeenth assignment of error is the only one that need be noticed. The offer was to show by the witness that he knew personally the sample and its successful operation, and then to show that the generators made by the plaintiff did not correspond with the sample in *manner or form*, and that they did not produce the results which the contract sample did. The court rejected the latter part of this offer. The defendant not only offered but did prove the former part of the offer, by producing a sample and then pointing out the differences in manner and form of that made by the plaintiffs. The Whiting, or sample, is bell-mouthed in the perforated case, the Miller & Co. is not. In one the chimney is movable, and in the other it is not. In one the burner tube is long, in the other it is short. The wick tube of the Miller & Co. did not correspond with the wick tube of the contract sample, one being shorter than the other; and an entire difference in the mode of fastening them

Kincaid's Appeal.

on. The witness mentioned other differences also. Now, as the jury have found that the generators made by the plaintiffs were made according to the sample, it is evident they either disbelieved this witness, or supposed the differences described by him were unsubstantial and immaterial. But, suppose the defendants had been permitted to corroborate the testimony of the witness by showing that the Whiting or sample generator would perform well the intended purpose, and that the plaintiff's would not, and failed to generate gas for illumination, who can say that this important corroborating fact would not have turned the scale and caused the jury to render a different verdict on this question of fact, whether the generators were really made alike? This refusal of the court to receive the evidence as offered, was therefore an error, and the judgment is reversed and a *venire facias de novo* is awarded.

Judgment reversed.

KINCAID'S APPEAL.

(66 Penn. St. 411.)

Constitutional law. Cemeteries — rights of lot-owners in.

The purchaser of a lot in a cemetery for "burial purposes" does not take any title to the soil; and an act of the legislature, directing the vacation and sale of the cemetery and the removal of the bodies, is not an unconstitutional infringement of his rights.

BILL in equity by Boyd *et al.* against Kincaid, Parker and Vankirk, for an injunction. The opinion states the case.

J. F. White and *J. J. Kerr*, for appellant, cited *Sharpless v. Mayor*, 9 Harris, 161; *Commonwealth v. Hartman*, 5 id. 119; *Commonwealth v. Maxwell*, 3 Casey, 444; *Harvey v. Thomas*, 10 Watts, 68; *Commonwealth v. Mc Williams*, 1 Jones, 70; *Coates v. Mayor of New York*, 7 Cowen, 585; *Pittsburg v. Scott*, 1 Barr, 320; *Chambers v. Wells*, 12 Harris, 249; *Richards v. N. Western Church*, 32 Barb. 42; *Price v. M. E. Church*, 4 Ohio, 515; *Pittsburg v. Scott*, *supra*; *Norris v. Clymer*, 2 Barr, 284; *Fullerton v. McArthur*, 1 Grant, 232; *Custer v. Commonwealth*, 1 Casey, 375; *Mott v. Penn.*

Railroad, 6 id. 9; *Keneass' Appeal*, 7 id. 87; *Grenawalt's Appeal*, 1 Wright, 95.

R. Woods, for appellee.

SPARSWOOD, J. This is an appeal from a decree awarding a preliminary injunction. The motion in the court below was upon a bill filed and sworn to, but without any injunction affidavit or affidavits. This is a practice which ought not to be countenanced. The defendant, however, did not take any objection on this account, but put in an answer under oath. Neither bill nor answer is as full as it ought to be; but we may gather from them enough to enable us to decide this appeal.

It appears that in 1834 "the Methodist Episcopal Church in the city of Pittsburg" purchased a piece of ground for the purpose of a grave-yard, and that it was so dedicated and used. The church was afterward divided into three separate stations or congregations, and the trustees of the original society conveyed the said lot, in 1849, to them as tenants in common. The interest of one of the said congregations has since been assigned and transferred to the Centenary Board of the Pittsburg Conference of the Methodist Episcopal Church. It is not a matter of contention but that subject to whatever rights individuals may have acquired in the graves and burial-lots, the title, legal or equitable, is in these parties. It also appears that in process of time the ground ceased to be used any longer for interments, and many of the bodies had been removed to other cemeteries. The city was growing and becoming closely built around it, and as no income was derived from it by the churches, there were no means of keeping it in proper order, and from its neglected condition it was rapidly becoming a nuisance to the neighborhood. In this state of affairs the legislature passed an act, April 13, 1867, Pamph. L. 1234, entitled "An act for the vacation and sale of the Methodist burial-ground in the city of Pittsburg, and for removing the bodies therefrom." After reciting the facts, it provided "that from and after the passage of this act it shall be unlawful to make interments in the said burial-ground; and after the removal of the bodies therein, as provided for in this act, the same shall be vacated for burial purposes." It proceeds to declare that the commissioners to be named in the act should be authorized to purchase one or more suitable lots in some

Kincaid's Appeal.

of the cemeteries in the vicinity of the city, and remove thereto all the remaining bodies in the said burial-ground, and have them decently interred; and they shall also remove and set up over the new graves the monuments and tombstones now standing in the said burial-ground over the present graves, with a proviso for the publication of an advertisement of their intention to do so. After the removal, the commissioners are to sell the ground in such manner as they shall deem most advisable and most likely to realize the most money; and the proceeds are to be distributed by them: 1st. To pay the expenses of removal, including the cost of the new lots. 2d. To compensate the lot-holders; and 3d. The balance, after defraying other necessary or incidental expenses, to be divided between the congregations entitled and the Centenary Board. The commissioners are authorized to compromise and settle with the lot-owners, either before or after the removal of the bodies, and if they cannot agree they may apply to the court of quarter sessions, who shall appoint three disinterested persons as arbitrators to determine how much, if anything, shall be paid to each lot-owner, and their award, when approved by said court, shall be final and conclusive. The defendants are the commissioners appointed by this act and a supplement thereto, passed February 14, 1868, Pamph. L. 167. The congregations interested ultimately, have not been made parties, as it would seem that they ought to have been, but we may assume that the act of assembly was passed at their instance. The allegations of the bill, that the defendants are carrying out the act in an improper manner, and not in accordance with its directions, are denied in the answers. So that the only question is, whether as to these complainants the act is constitutional so far as it directs the removal of the bodies and of the tombstones and monuments to some other cemeteries. The learned president of the district court was of the opinion that this was an unconstitutional infringement upon their rights, and therefore awarded the injunction.

The plaintiffs may be divided into two classes; holders of certificates and holders of interment permits. The certificate set out in the bill states that the subscriber, in consideration of \$10 paid by him, is entitled to "two burying lots in the burying-ground of said church;" "to have and to hold the said lots for the use and purpose, and subject to the conditions and regulations mentioned in the deed of trust to the trustees of said church." This deed

of trust is not produced or annexed to the bill. We have printed in the appendix of the paper-book of the appellants the deed of Keating and wife to the Methodist Episcopal Church of the city of Pittsburg; but in this deed no trustees are named. It is a direct grant to the church; expresses no trust—not even the object for which the ground was conveyed. The appellants admit, however, in their paper-book that the deed to the trustees contains no conditions or regulations on the subject. We will assume this to be so. We cannot, however, consider the certificate as evidence of a grant to the lot-holders of any interest or title in the soil; and if this is so, of course not the interment permits. Had it been so intended it would surely have contained words of inheritance. Taking it for a grant, it is only for the life of the lot-holder, and at the very time it would be needed for his own interment his title would cease. Without any accompanying conditions and regulations it is a very loose paper. We hold that it was the grant of a mere license or privilege to make interments in the lots described, exclusively of others, as long as the ground should remain “the burying-ground of the church.” Whenever by lawful authority it should cease to be a burying-ground, his right and property would cease. The lot-holder purchased a license—nothing more—irrevocable as long as the place continued a burying-ground, but giving no title to the soil. Whether it was an incorporeal hereditament descendible to him, or passed on his death to his personal representative, it is unnecessary to decide. While the license continued he could, perhaps, bring trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers. But if in the course of time it should become necessary to vacate the ground as a burying-ground, all that he could claim, in law or equity, would be that he should have due notice and the opportunity afforded to him of removing the bodies and monuments to some other place of his own selection, or that, on his failing to do so, such removal should be made by others. He accepted the grant or license subject to this necessary condition. We are not without decisions in our sister States in support of this view. In *Windt v. German Reformed Church*, 4 Sandf. Ch. Rep. 471, it was held that the sepulture of friends and relations in a cemetery belonging to a religious society confers no right or title upon the survivors, and they cannot prevent the sale of such cemetery by the corporation and the removal of the interred remains, when such removal is in

Kincaid's Appeal.

other respects conducted according to law; and in that case the vice-chancellor remarked: "the only protection afforded to the remains of the dead, interred in a cemetery of this description, is by the public laws prohibiting their removal, except on the prescribed terms, and in a still stronger public opinion. Probably these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvellous rapidity, and whose wants leave but little room for the remains of the dead in the dense and crowded haunts and thoroughfares of the living." He adds, speaking of such a grant or permit: "It confers the privilege of sepulture for such body in the mode used and permitted by the corporation, and the right to have the same remain undisturbed so long as the cemetery shall continue to be used as such, and so long also, if its use continues, as such remains shall require for entire decomposition; and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture." In *Richards v. The North-West Protestant Dutch Church*, 32 Barb. 42, it was held that the sale of a church vault gave the right of interment in that particular plat of ground so long as that and the contiguous ground continued to be occupied as a church-yard. Every person purchases such privilege with the full knowledge and implied understanding that change of circumstances may in time require a change of location. He cannot, therefore, have an injunction to prevent the disposition of the soil and the removal of the remains. See also *Price v The Methodist Episcopal Church*, 4 Ohio, 515. The grant of a pew in a church edifice creates a kind of right which appears to be in all respects analogous to that of a burial lot in a grave-yard. In regard to pews there have been many more determinations than in regard to burial lots, and the voice of the authorities is uniform and clear. The grant of a pew in a church edifice in perpetuity does not give to the pew-owner an absolute right of property, as in a grant of land in fee. He has a limited usufructuary right only. He must be presumed, from the very nature of the subject-matter, to have taken the grant under all the conditions and limitations incident to such property. If the edifice becomes useless by dilapidation, or is destroyed by fire or any other casualty, the right of the pew-owner is gone. So, if from age, decay or other injury the house has to be rebuilt in the same place, or from some necessary cause the location must be changed, the

old edifice sold and a new one erected on another spot, the pew-holder has no claim either in law or equity. It is said, indeed, in some of the cases, that if the congregation or parish, from mere motives of convenience or ornament, resolve to pull down the old and erect a new church edifice, in such case the pew-owner is entitled to compensation; that is, the parish or church from whom the grant is derived must not wantonly deprive their grantee of the benefit of the license or privilege without making to him compensation. But where it is an act of necessity, required by the condition of the building or other imperative exigency, he has no claim whatever to compensation. *Gay v. Baker*, 17 Mass. 435; *Daniel v. Wood*, 1 Pick. 102; *Wentworth v. First Parish in Canton*, 3 id. 344; *Howard v. First Parish in North Bridgewater*, 7 id. 138; *Fassett v. First Parish in Boylston*, 19 id. 361; *Freligh v. Platt*, 5 Cow. 494; *Voorhees v. Presbyterian Church of Amsterdam*, 8 Barb. 135; S. C. 17 id. 103; *Reformed Church in Saugerties*, 16 id. 237; *Cooper v. The First Presbyterian Church of Sandy Hill*, 32 id. 222; *Brick Presbyterian Church*, 3 Edw. Ch. 133; *Baptist Church in Hartford v. Witherell*, 3 Paige, 296; *Kellogg v. Dickinson*, 18 Vt. 266; *Perrin v. Grange*, 33 id. 101. I do not pretend that this citation exhausts the cases on the subject, but they are the leading ones. This court has followed this train of decisions in *Church v. Wells' Ex'rs*, 12 Harr. 249, in which LOWRIE, J., said, "a pew right is not of such a character as to prevent an absolute sale of the church edifice, either by contract or judicial process; by itself it was never known as a subject of taxation; if the edifice burns down the pew right is gone; it does not prevent the society from tearing down and rebuilding the edifice or from altering the whole interior arrangement of it; it does not authorize the pew-holder to change and decorate the pew according to his fancy, or to cut it down and carry it away; and it gives him no right to the ground on which it stands. It is, therefore, a right that is entirely peculiar."

Such being the restricted and qualified character of the rights of the plaintiffs, whether as holders of certificates or permits, it remains to inquire whether the ground in question had, by lawful authority, ceased to be a burying-ground; and the removal of the remains of the bodies, with the monuments, to another place or places in like manner authorized. The disinterment of a dead body is a misdemeanor, and indictable at common law as an offense, "highly indecent and *contra bonos mores*." *King v. Lynn*, 2 Term. 733;

Kincaid's Appeal.

Commonwealth v. Cooley, 10 Pick. 37; *Kanavanis' Case*, 1 Greenl. 226. We cannot doubt that it is competent for the legislature to authorize or to delegate that power to the municipalities. It is a police power necessary to the public health and comfort. As they can authorize the removal of any other thing which they may deem a nuisance, by a summary proceeding, without a jury trial, so they can authorize and direct the removal of dead bodies from any ground, and the consequent vacation of it as a burying-ground. No one can doubt the power of the legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome, such was the universal rule. It was one of the laws of the twelve tables "*hominem mortuum in urbe ne sepe- lite neve vicinitate.*" It is much to be regretted that it was not adopted as our policy at an early period. This is no invasion of any right of property. Every right, from an absolute ownership down to a mere easement, is purchased and held subject to the restriction that it shall be so exercised as not to injure others. Though at the time it may be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise, by the residence of many people in its vicinity, and that it must yield to laws for the suppression of nuisances. If conditions or covenants, appropriating land to some particular use, could prevent the legislature from afterward declaring that use unlawful, legislative powers necessary to the comfort and preservation of populous communities might be frittered away into perfect insignificance. If a man were to purchase a building upon condition that it should only be used for the storing of gunpowder—though perfectly lawful at the time—if the legislature made it unlawful, his property would become valueless; yet it would hardly be pretended that he would have any right to compensation as for property taken for public use. So the holder of a burial lot, in which, as yet, no interments have been made, who has purchased and paid for it under the restriction that it shall be used for no other purpose, by the passage of a law making such interments unlawful, loses all use of the lot. Yet he has no claim for compensation, for it cannot be said in any sense that his property has been taken for public use. The State has the unquestionable right to regulate the use of all property for the public good. Therefore, a statute authorizing the harbor master of New York to regulate and station vessels in the East and North rivers, was held to extend to the wharves of private

owners, and that it was not unconstitutional as interfering with private property. *Vanderbilt v. Adams*, 7 Cow. 349. Where the corporation of the city of New York had conveyed to a religious society a piece of ground for burial purposes, with a covenant for quiet enjoyment, and afterward, in pursuance of authority vested in them, prohibited all future interments, it was held that the covenant no longer existed. When one covenants not to do a thing which it is lawful for him to do, and an act of the legislature comes afterward and compels him to do it, the act repeals the covenant. *Brick Presbyterian Church v. The Mayor, etc., of New York*, 5 Cow. 578. It has, accordingly, been always maintained that such laws and ordinances, as applicable to existing burial-grounds, are constitutional and valid. *Coates v. The Mayor, etc., of New York*, 7 Cow. 585; *City Council of Charlestown v. The Wentworth First Baptist Church*, 4 Strob. Law Rep. 306. If, upon the principles thus stated, the constitutionality of this exercise of legislative power is unquestionable, ought it to be doubted for a moment that they can proceed a step further and declare a burying-ground to be vacated as such, and authorize and direct the removal of the bodies therefrom? As to those recently interred, the necessity, with a view to public health and comfort, of removing them is as apparent as the prohibition of future interments. With those which have become entirely decomposed, leaving only the bones, that necessity may not be so urgent, but of that the legislature are the exclusive judges. They may direct the removal in such manner and upon such terms as to them may seem wisest and best—having due regard to that feeling of reverence and attachment which all men naturally have to the spot where the ashes of their departed ancestors and friends repose, and the strong desire that, if possible, they should not be disturbed. Even these feelings, however, must yield to the higher consideration of the public good.

We have come, then, to the conclusion that the act of assembly of April 13, 1867, was constitutional and valid, and that the preliminary injunction below ought not to have been awarded.

Decree reversed, and record remitted for further proceedings.

 Jones v. Wagner.

JONES, appellant, v. WAGNER.

(66 Penn. St. 439.)

Support of Soil over Mines.

By a decree in partition the surface of an estate containing a coal deposit was severed from the underlying mineral, and the parts were allotted to different heirs without limitation. *Held*, that the mineral-owner was liable to the surface-owner for injury to buildings, etc., upon the surface, caused by not leaving proper supports in mining the coal. In such a case all the coal belongs to the mineral-owner, but the maxim *sic utere tuo ut alienum non laedas* applies.

ACTION on the case by Wagner against Jones. The opinion sufficiently states the case.

M. W. Acheson, for appellant, cited *Smart v. Morton*, 30 Eng. Law & Eq., 385; *Roubotham v. Wilson*, 8 H. of L. 348; *Caldwell v. Fulton*, 7 Casey, 475; *Sheppard's Touchstone*, ch. 5, p. 89; *Clement v. Youngman*, 4 Wright, 341; *Brown v. Corey*, 4 id. 495; *Penn. Salt Co. v. Neel*, 4 P. F. Smith, 9; *Whitaker v. Brown*, 10 Wright, 197; *Turner v. Reynolds*, 11 Harris, 199; *Irwin v. Covode*, 12 id. 167; *Ratcliff v. Mayor of Brooklyn*, 4 Comst. 195; *Clark v. Foot*, 8 Johns. 421; *Frankford & B. T. Co. v. The Phila. & T. Railroad*, 4 P. F. Smith, 345; *Panton v. Holland*, 17 Johns. 92; *Rockwood v. Wilson*, 11 Cush. 221; *Bentz v. Armstrong*, 8 W. & S. 40; *Haldeman v. Bruckhart*, 9 Wright, 514; *Wheatley v. Baugh*, 1 Casey, 528; *Smith v. Kenrick*, 7 Mann. G. & S. 515; 1 Greenlf. Ev. §§ 292, 294; 2 Parsons on Cont. 49; *Dwight v. Whitney*, 15 Pick. 179; *Stultz v. Dickey*, 5 Binn. 285; *Aughinbaugh v. Coppenheffer*, 5 P. F. Smith, 347; *Taylor's Land. & Ten.* §§ 350, 538, 554; *Van Ness v. Pacard*, 2 Pet. 137; *McCullough v. Irvine*, 1 Harris, 438; *Washburne on Easements*, 441, *et seq.*

S. M. Raymond and *C. B. M. Smith*, for appellee, cited *Washburne on Easements*, 16, 17; *Kieffer v. Imhoff*, 2 Casey, 438; *Stoeper v. Whitman*, 6 Binn. 416; *Rapp v. Palmer*, 3 Watts, 179; *Newbold v. Wright*, 4 Rawle, 212; *Coxe v. Heisley*, 7 Harris, 243; *Foley v. Mason*, 6 Md. 37; *Jordan v. Meredith*, 3 Yeates, 318; *Henry v. Risk*, 1 Dal. 265; *Frith v. Barker*, 2 Johns. 327; *Brown v. Jackson*, 2 Wash. C. C. 24; *Holmes v. Johnson*, 6 Wright, 159;

Humphries v. Brogden, 1 Eng. L. & E. 241; *Harris v. Ryding*, 5 M. & W. 60; *The Earl of Glasgow v. The H. & C. Alum Co.*, 8 Eng. L. & E. 13; *Farrand v. Marshall*, 19 Barb. 380; *Richardson v. Vermont C. Railroad*, 25 Vt. 465.

THOMPSON, C. J. The piece of ground out of which the controversy in this case has arisen, formerly belonged to John Ormsby's estate, and in the partition of that estate in November, 1855, the minerals in and the surface of the land were separated and made to constitute two separate and distinct properties or estates, without any restriction, limitation or servitude imposed on either, and were so allotted among two of Ormsby's heirs. The plaintiff claims title to the surface through the heir to whom it was allotted, and so do the defendants to the minerals from another heir to whom they were allotted.

The question in the court below and here is, whether the latter have, by their unrestricted title, the right to mine and take out *all* the coal underlying the surface, without liability for injury thereto, or to buildings and improvements thereupon by subsidence or otherwise. The learned judge below reserved the point and submitted to the jury the question of injury; to what amount, and whether it arose from unskillful or negligent mining in not leaving sufficient pillars or props in the mine to sustain intact the surface. On this question the jury found for the plaintiff, and at a subsequent day the court ruled the reserved question also in his favor, and entered judgment on the verdict. From this statement it will appear that the only negligence or unskillfulness at all attributable to the defendants, if any, arose from not leaving sufficient pillars of coal or supports to sustain the surface, and this they undoubtedly did not, most probably under the belief that all the coals in the mine belonged to them by virtue of their purchase and title. This was certainly true with the exposition of such a right given by Baron PARKE, in *Harris v. Ryding*, 5 M. & W. 60: "I do not mean to say," observed that able judge, "that all the coal does not belong to the defendants, *but they cannot get it without leaving proper supports.*"

The right of supports, *ex jure nature*, which the owner of the soil is entitled to receive from the minerals underneath, has, within comparatively a few years, received much attention in the courts in England, and the rule deducible from the cases in all the courts,

 Jones v. Wagner.

the house of lords, exchequer and Queen's bench, is, that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of sufficient supports to sustain the latter, or in default, there is liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. This is fully supported by *Harris v. Ryding*, 5 M. & W. *supra*, determined at easter term, 1839, in the exchequer; *Humphries v. Brogden*, 1 Eng. Law & Eq. 251 (1850), in the queen's bench, before Lord CAMPBELL, chief justice, and PATTESON, COLERIDGE and ERLE, JJ. The whole question was there discussed most learnedly and ably by the lord chief justice, and the same result arrived at as had been in the court of exchequer, *supra*, and in the case of *The Earl of Glasgow v. The Hurlet Alum Co.*, house of lords in 1850, 8 Eng. Law & Eq. 13. There are many other cases referred to in the English courts to the same effect, by Rogers on Mining, p. 455, *et seq.* Among them are *Rowbotham v. Wilson*, 8 H. L. Ca. 348; *Pennington v. Gallard*, 9 Exch. 1, for the principle stated by the learned author at page 467: "That if an owner of lands grant a lease of the minerals beneath the surface with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface, and so conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law, upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support." These citations prove two things, viz.: that the owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligence, and so may be declared upon. *Humphries v. Brogden*, *supra*.

A usage to mine without the observance of this duty by defendants, must have been so ancient and uniform in the region in which the property is situated, as to amount to a custom or usage capable of controlling the rule of the common law cited above, and of becoming the law itself. One element of such a custom would be, that it is so ancient "that the memory of man runneth not to the contrary." This could not be, and was hardly pretended of the locality in question. Nor is it likely that in a business like mining bituminous coal, found only in the western counties of the State.

there ever was any rule there other than that which would result from convenience.

As to the house in question damaged, it undoubtedly had a right to supports as incident to the ground on which it stood. What might be the consequence of building in an unreasonable manner, taking into view the mining rights beneath, on a question of the sufficiency of the supports, does not arise in this case and need not be decided.

We have no case strictly of authority in our books, nor do I find any in the books of our sister States. In most of them but little subterranean mining exists, and in others the question has not presented itself for adjudication. In none of the cases cited by the learned counsel from our State reports, is the question decided or intentionally touched; we therefore must rule the point for ourselves for the first time. The English cases referred to, and others which might be referred to, emanate from great ability, and from a country in which mining, its consequences and effects, are more practical, and the experience greater, than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter, and hold that in the case in hand, the recovery was right, predicated as it was of the want of sufficient supports in the mine to prevent the plaintiff's ground, house and orchard from injury, by subsiding into the cavity made in the earth by the removal of the coal. The upper and underground estates being several, they are governed by the same maxim which limits the use of property otherwise situated, *sic utere tuo ut alienum non ledas*. We have no doubt but all the evils deprecated by the adoption of this rule will disappear under regulations adapted to each case of severance of the soil from the minerals. Contract may devote the whole minerals to the enjoyment of the purchaser, without supports, if the parties choose. If not, the loss by maintaining pillars or putting in props will necessarily come out of the value of the mineral estate. If at any time the public necessities may demand the pillars to be removed for fuel, we may safely assume that the same necessity will provide some rule which will be satisfactory in such a crisis. We think the case was well decided below, and that the judgment must be affirmed.

Judgment affirmed.

HOMAN, appellant, v. STANLEY.

(66 Penn. St. 464.)

Respondent superior. Excavations — liability of lot owners.

The owner of a city lot, having determined to build, let parts of the work to different persons — to one, the excavation, to another, the stone-work, to another, the superstructure; while himself delivered stone, lime and sand. *Held*, that the owner, and not the contractors, was responsible for an injury to a traveler, caused by the excavation being insufficiently guarded.

ACTION on the case by Stanley against Homan. On the 10th of May, 1869, in the night-time, the plaintiff fell into an excavation at the corner of Fourteenth and Carson streets, Birmingham, and sustained injuries of a very serious character, for which he seeks to recover damages against the defendant, the owner of the premises, on the ground that he was guilty of negligence in not having a sufficient guard or barrier around the excavation.

It appeared in evidence, and was not controverted, that the defendant was the owner of the corner lot; that having determined to improve it, he employed the borough regulator to designate the lines of the foundation and set in the pins; that he contracted with Christian Homberg to make the excavation for the cellar, and also for a coal-vault under the side-walk, adjoining on Fourteenth street, at 40 cents per cubic yard; the latter furnishing his own horses and carts, and employing his assistants, and disposing of the earth for his own benefit; that he contracted with Joseph Brown for the masonry at \$1 and \$1.10 per perch; the defendant finding the materials, viz., stone, lime and sand, and delivering the same on the ground; and that he also contracted with William Kline for the superstructure, including the belt course; that the defendant, as the excavation and mason work progressed, visited it from time to time, and on one occasion complained to Homberg that he was not pushing the work of excavation fast enough, and threatened to take it out of his hands and employ some one else to finish it. It also appeared in evidence that the defendant had teams employed delivering the stone at a stipulated price per perch, and the sand and lime by the bushel.

While the excavation and the mason work were both progressing under these contracts, and the former nearly completed, the plaintiff,

in the night-time, fell into the excavation and received the injuries complained of.

The grounds of defense, mainly relied upon by the defendant, were:—

1st. That sufficient guards or barriers were placed around the work by those in charge of it.

2d. That the plaintiff was a trespasser on defendant's lot, and fell thence into the excavation.

3d. That the plaintiff himself was guilty of negligence, which materially contributed to his injury; and

4th. That under the contracts in evidence, it was the duty of the contractors, and not of the defendant, to erect and maintain a suitable guard or barrier around the excavation.

As to the first three grounds of defense, the facts on which they were based were submitted to the jury, and they found against the defendant.

As to the remaining ground of defense, the court reserved the question of law raised by the facts; and subsequently judgment was rendered in favor of the plaintiff. The case was then appealed by defendant.

A. M. Brown, for appellant, cited *Painter v. Pittsburg*, 10 Wright, 213; *Allen v. Willard*, 7 P. F. Smith, 374; *Hunt v. Penn. Railroad Co.*, 1 id. 475; *Sherman & Redfield on Negligence*, §§ 77, 80.

Miller & McBride, for appellee, cited *Allen v. Willard*, *supra*; *Sherman & Redfield on Negligence*, § 83; *Buffalo v. Holloway*, 7 N. Y. 493; *Storrs v. Utica*, 17 id. 104; *Congreve v. Smith*, 18 id. 79; *Creed v. Hartman*, 29 id. 26; *Chicago v. Robbins*, 2 Black, 418.

READ, J. This was an action against an owner of premises on which he was building a house, for negligence in leaving an excavation or cellar without a sufficient guard or barrier to prevent plaintiff from falling therein.

The jury found, 1st, that sufficient guards or barriers were not placed around the work by those in charge of it; 2d, that the plaintiff was not a trespasser on defendant's lot, and fell thence into the excavation; and, 3d, that the plaintiff himself was not guilty of any negligence which contributed to his injury. This left but one question, which was referred by the court, whether, under the admitted facts, the defendant was liable for the injury.

Homan v. Stanley.

The facts on this point were stated by the court: "These facts in regard to the contracts are admitted, and *by consent of counsel* we will reserve the question of defendant's liability arising from these facts, and for the present instruct you *pro forma*, that there is nothing in these facts as to the contracts for excavation and mason work, that will exempt the defendant from liability in this case."

Whether the reservation is in the best form is now immaterial, as it was done by consent of counsel, and no objection was suggested here. The learned judge, in a very able opinion which renders unnecessary any further exposition, holding the defendant liable, ordered judgment in favor of the plaintiff and against the defendant for the amount found by the jury.

The owner is undoubtedly, legally and morally, liable for such negligence, unless he can shift the responsibility clearly upon some one else, and this is necessary for the safety of our fellow-citizens, particularly in populous places. In the present case he has not shifted the responsibility, and he is therefore liable.

An owner who excavates a cellar, and carries the excavation to the curbstone for the purpose of constructing a coal-vault under the sidewalk, is bound by his duty to the public to have it securely fenced. This is the more necessary, as the excavation for the coal-vault is in the public street.

Judgment affirmed.

NOTE.—The following is the opinion of Judge STRECHT, referred to in the opinion of the supreme court—REPL.

The question is, what was the duty of the defendant under the admitted facts? Was it *his* duty to see that sufficient guards were placed around the excavation, or was this duty devolved on the contractors or either of them? If it was the defendant's duty, then under the other facts of the case, as settled by the verdict, he is liable, and the plaintiff is entitled to judgment on the verdict. In this connection it should be observed that there was no direct testimony as to whether the defendant had a license or permit from the borough authorities to excavate the sidewalk for the purpose of constructing a coal-vault. It was not made a question on the trial, and it has been assumed, and we think properly, too, that he had their consent. This may be fairly inferred from the evidence as to the employment of the borough regulator to mark the lines and set in the pins. Of course, if the defendant caused the sidewalk

to be excavated without permission of the borough authorities, he could not by any contract evade liability to any one injured by falling into the excavation. But we treat the case as though he had permission and the work was lawful.

In our leading case, *Painter v. The City of Pittsburgh*, 10 Wright, 213, it was held that the city was not responsible for an injury occasioned by the negligence of her contractors or of their employees; that the remedy was against the contractors alone.

* * * The doctrine of the case has since been recognized with approval in several cases, the latest of which is *Allen v. Willard*, 7, P. F. Smith, 374, in which Mr. Justice AGNEW says: "The principle to be extracted from the cases is said to be that a person, natural or artificial, is not bound for the negligence of another, unless the relation of master and servant, or principal, or agent, exist between them; and that when an injury is done by a person exercising an independent employment, the party employing him is not responsible to the person injured. This doctrine," he further says, "is applicable only to causes where the purpose of the contract is entirely lawful, and where the owner of the property on which it is to be executed can lawfully commit its execution to others. There are cases where responsibility cannot be thrown off through the employment of another to execute the work by contract; as where a contractor is employed to dig a trench in a public street without any authority in the employer himself to break ground. For does the principle extend to cases where the employer of the contractor has not relinquished his control over the work to be done, and still continues liable for his duty to others in respect to it?"

Does the case before us fall within the principle of these adjudicated cases, or is it distinguishable from them? In the case of *Painter v. The City of Pittsburgh*, the contract embraced the entire work. The city had nothing whatever to do with it, either in furnishing material or otherwise, except to see that the work was done to the satisfaction of the recording regulator. The contract in *Allen v. Willard* was similar in terms. In the case before us, different parts of the work were let to different persons; to one the excavation; to another the stone-work; and to another the superstructure; while the defendant himself had teams employed in delivering stone, lime and sand on the ground. The fact that these materials were delivered at a stipulated price, would not

Homan v. Stanley.

affect the relation of the parties. The defendant still retained control over them.

The question is whether the facts as to the letting of the work by the defendant are sufficient to take it out of his control and cast the responsibility entirely upon the contractors.

In populous cities and towns, where the lives of many may be endangered by excavations and improvements, it is of the highest importance and public policy requires that the duty of providing adequate protection to the public should not be lightly cast upon irresponsible or transient persons. In all cases it is *prima facie* the duty of the owner of property on which improvements are being made to afford this protection, and the responsibility being thus cast upon him, nothing short of clear and satisfactory proof should permit him to transfer it to others. It should be clearly shown that the control of the work was relinquished by the owner, and by contract committed to others. Where, as in the cases cited, the owner contracts for the entire work, in all its details, it is very manifest that this implies a relinquishment of his control over it, and devolves on the contractor the duty which would otherwise attach to himself. But where the work is split up in different contracts, and the owner undertakes, as in the present case, to supply one of the contractors with materials to be used in the execution of his contract, and no provision is made for the supervision of the work or the erection and maintenance of guards around it, we are justified in drawing the inference that the owner retained the supervision; and that his duty to protect the public has not been devolved on others. There is certainly no hardship in holding the owner to this measure of responsibility, and it appears to us that nothing short of it will satisfy the demands of sound public policy.

In the present case, nothing appears in the contracts as to the supervision of the work, or the duty of placing guards around it, and it is not unfair to the defendant to infer that he reserved these to himself. Under the admitted facts we are of opinion that the duty of erecting and maintaining a sufficient barrier around the excavation was not shifted from the defendant to the contractors, or either of them. He had, to a certain extent at least, a control over the work. He had teams employed delivering materials for the mason work, and on one occasion, at least, he claimed and threatened to exercise the right of discharging Homberg and employing another in his stead.

Again, it does not appear how the contractors, Homberg and Brown, were to do the work; whether under the direction and control of the defendant or otherwise. As was said by AGNEW, J., in *Allen v. Willard*, the fact that each had a contract with the defendant for his particular work, did not, in itself, separate defendant from its supervision and control. To pay for stone-work by the perch, or to do the whole excavation under a contract, does not necessarily destroy the relation of master and servant.

In that case, Allen, who had contracted with the owner for the erection of the entire building, including excavation, stone-work, materials, and everything pertaining to it, sought to evade the responsibility which he had assumed, by showing that he had sublet the stone-work by the perch to one, and the excavation, into which the plaintiff's husband fell, to another. These sub-contracts were very similar in their features to the contracts of Homberg and Brown, in the case before us, and yet the supreme court held that the sub-letting of the work was not such as took it out of the control and direction of Allen and cast the responsibility wholly on the sub-contractors. So in this case, we are of opinion that the contracts with Homberg and others did not shift the responsibility from the defendant to the contractors, and that therefore the former is liable.

And now, July 23, 1870, it is ordered that judgment be entered on the question of law reserved, in favor of the plaintiff.

Ross, appellant, v. EsPY.

(66 Penn. St. 481.)

Promissory note — verbal agreement between indorsers. Evidence.

A. and B., the indorsers of a promissory note, agreed verbally, at the time of the indorsement, that they would be jointly liable in case the maker failed to pay.

Held, that the agreement was provable and enforceable.

The contract of indorsement is not within the rule which excludes proof to alter or vary the terms of an *express* agreement.

FEIGNED ISSUE, in which Ross was plaintiff, and EsPY defendant. The opinion states the case.

Ross v. Espy.

R. & S. Woods, for appellant.

N. P. & C. S. Fetterman, for appellee, cited *Saurman v. Bodey*, 6 Wright, 476; *Pierce v. Butler*, 14 Mass. 303-312; 1 Greenl. Ev. § 401; Act of April 26, 1855, § 1, Pamph. L. 308, Purd. 497, pl. 4; *Miller v. Fichthorn*, 7 Cas. 252; *Jack v. Morrison*, 12 Wright, 113.

AGNEW, J. A note was drawn by Smithley to order of Ross, and by him indorsed; then indorsed by Espy, and discounted at the Iron City Bank. Payment failing, the bank got separate judgments against the indorsers Ross and Espy. Espy paid the bank, and claimed the right to control the judgment against Ross. Ross alleged an agreement at the time the note was drawn and indorsed (all the parties being together) that he and Espy should indorse for the accommodation of Smithley, and in the event of his failure to pay, that he and Espy should contribute equally. This was a feigned issue to try the fact as to contribution. Smithley was offered as a witness, and objected to as a party to the note and incompetent, the trial being on the 15th of March, 1869, and was received by the court subject to the right to exclude his testimony afterward, and no exception taken by the defendant to his admission. The trial being a month before the act of 15th April, 1869, making interest and policy of law no longer a ground of incompetency, Smithley was then incompetent. *Saurman's Ex'rs v. Bodey*, 6 Wright, 476; *Barton v. Fetherolf*, 3 id. 279. But the judge who tried the cause gave no instruction to the jury to exclude the testimony of Smithley, and charged them peremptorily, "as a matter of law, that under *all* the evidence in the case the plaintiff cannot recover, and their verdict must be for the defendant." Whether the learned judge had in his mind the whole evidence excluding the testimony of Smithley (which is quite possible) we cannot tell from the charge sent up to us. But the evidence having been received without exception, in order to reserve the question, it was the duty of the court to have charged expressly on the competency of the witness if they believed him incompetent, in order that the plaintiff might have the benefit of an exception if he conceived himself aggrieved by the decision. As the evidence stood before the jury, the agreement proved by Smithley was a flat bar to Espy's right to recover more than the one-half of the money he

advanced in payment of the note. Whatever objection there might have existed to the competency of the channel through which the evidence came, the evidence itself was entirely competent. The contract of indorsement is one *implied* by the law for the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an *express* agreement. This is well settled. *Susquehanna Bridge and Bank Co. v. Evans*, 4 Wall. C. C. R. 480; *Barclay v. Weaver*, 7 Harris, 396. The very point now before us was decided in *Hill v. Ely*, 5 S. & R. 363, and *Patterson v. Todd*, 6 Harris, 426, and analogous decisions will be found in *Bank v. Fordyce*, 9 Barr, 276, and *Miller v. Henderson*, 10 S. & R. 290. The agreement to contribute equally between the indorsers modified the implied contract of Ross by his indorsement to pay Espy; and being made at the very time when they both indorsed for the accommodation of Smithley, the court ought so to have informed the jury, unless they had previously excluded the testimony of Smithley.

Judgment reversed, and a venire facias de novo awarded.

STITZELL, appellant, v. REYNOLDS *et al.*

(67 Penn. St. 54.)

Slander — charging indictable offense when not. Measure of damage.

In an action of slander, the words charged to have been spoken by the defendant, were that the plaintiff "had stolen corn out of G's field." *Held*, that if the conversation, in the course of which the alleged words were spoken, showed that the defendant referred to "standing corn," the plaintiff could not recover, the larceny of standing corn being only an indictable offense, made so by statute, but not of an infamous character, or subject to an infamous or disgraceful punishment.

In an action of slander the jury, in assessing the damages, may consider the degree of malice with which the alleged slanderous words were spoken, as shown by the subsequent acts and declarations of the defendant; but they cannot give damages for such acts and declarations, however infamous or criminal they may be.

ACTION for slander by Reynolds and wife against Stitzell. The alleged slanderous words were, according to the first count, that

Stitzell v. Reynolda.

"Mrs. Reynolds had stolen corn out of Gribble's field;" according to the second count, that the defendant "was confident that Patrick Reynolds' wife stole Gribble's corn." At the trial, evidence was introduced to show that defendant had reference to "standing" or "roasting" corn, when he spoke the words charged, and that he was so understood at the time. The defendant made the following requests to charge:

"2. That if they believe, from the evidence, that the defendant spoke the alleged words, and that the persons to whom he spoke them, or who heard them, understood him to refer to standing corn, the plaintiffs cannot recover.

"3. That, if the conversation, in the course of which the alleged words were spoken, showed that the defendant had referred to standing corn, the plaintiffs cannot recover."

The court refused the points, and charged: "As to the measure of damages, there is no certain rule to be laid down for your guidance. Malice is the gist of the action. There is generally a less degree of malice in repeating a slander than in originating one. So, if defendant was told by Mrs. Gribble, before uttering the words, that plaintiff had been guilty of the charge, the damages ought not to be so great as if he had never heard it, but conceived it himself. This would be the general rule; but we can very well imagine exceptions which would not warrant the exercise of the rule. The damages should also be modified on account of the nature of the article alleged to have been stolen. That is, if it was understood that the charge referred to the mere taking of roasting-ears, the damage to the reputation would not be so great as if it referred to the stealing of gathered corn. Taking apples, peaches, or fruit yet attached, and not separated from the soil, although done in a furtive manner, has never been accounted a felony, but is a kind of a larcenous trespass. By the act of 1863, it is made a misdemeanor, and can be punished as such. Nevertheless, the damages should be such as, while it would vindicate the character of plaintiff, they should not be so large as to injure, materially, the estate of the defendant. They ought to be sufficient to vindicate and compensate the plaintiff for the injury sustained, and not so low as to leave a slur upon her character.

"But if the evidence of Thomas Gribble is believed, the damages should be vindictive, and such as would be a punishment to the defendant. If that evidence is believed, he concocted an

Stitzell v. Reynolds.

infamous scheme to destroy the character of the plaintiff, and purposed carrying it out by perjury. It is true this was after the suit was brought, and was done, no doubt, as a defense against the action. But, if defendant felt that he had injured the plaintiff, his true course would have been something in the way of reparation of the wrong, and not an effort to seal the slander through the instrumentality of perjury." * * *

Verdict for the plaintiff for \$318. Defendant appealed.

C. E. Boyle (with whom was *A. Howell*), for appellant, cited 4 Black. Com. 232; Archbold's Cr. Prac. and Pl. 376, 378; 3 Greenl. Ev. 163; The Acts of March 30, 1860, Pamph. L. 362; May 1, 1861, § 2, Pamph. L. 478; Purd. 687, pl. 1, 3; *Gosling v. Morgan*, 8 Casey, 275; *Barger v. Barger*, 6 Harris, 492; *Dottarer v. Bushey*, 4 id. 208; *Evans v. Tibbins*, 2 Grant, 451; *Colbert v. Caldwell*, 3 id. 191; 1 Starkie on Slander, 93, 99-101; *Dexter v. Fuber*, 12 Johns. 239; *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; 2 Saunders' Pl. and Ev. 899; *Findlay v. Bear*, 8 S. & R. 570; *Harvey v. Boies*, 1 Penn. 12; *Proper v. Luce*, 3 id. 66; 2 Greenl. Ev. § 418; *Eckart v. Wilson*, 10 S. & R. 53.

W. H. Playford, for appellee, cited *Eckart v. Wilson*; *Colbert v. Caldwell*, *supra*; *Deford v. Miller*, 3 Penn. 104; *Lukehart v. Byerly*, 3 P. F. Smith, 418; *Andres v. Koppenheaver*, 3 S. & R. 257.

WILLIAMS, J. This case has been already once before us, and is reported in 9 P. F. Smith, 488. There the judgment was entered generally on the first three counts of the declaration; the first of which, charging a mere trespass, was held to be vicious, and the judgment was reversed and a *venire de novo* awarded. On the retrial, the declaration was amended by striking out the first and fourth counts, and the cause was tried on the second and third counts, and resulted in a verdict and judgment for the plaintiffs. The record is now brought before us for the correction of alleged errors of the court in refusing to charge as requested by the defendant, and in the instructions given to the jury for their guidance in assessing the damages.

The words charged to have been spoken by the defendant, as laid in the second count of the declaration, are, that "Mrs. Reynolds had stolen corn out of Gribble's field:" and, as laid in the

Stitzell v. Reynolds.

third count, "that he was confident that Patrick Reynolds' wife stole Gribble's corn." The court was requested, in the second point submitted by the defendant, to instruct the jury that if they believe from the evidence that the defendant spoke the alleged words, and that the persons to whom he spoke them understood him to refer to standing corn, the plaintiff cannot recover; and, in the third point, that if the conversation, in the course of which the alleged words were spoken, showed that the defendant had referred to standing corn, the plaintiffs cannot recover. The court refused to charge as requested, and instructed the jury that the words laid in both counts are actionable; and, if the evidence is believed, they are substantially proved as laid, which is all that is necessary to maintain the action. The first and second assignments of error relate to the refusal of the court to affirm the defendants' points, and as they raise but one question, may be considered together.

By the rules of the common law, larceny cannot be committed of things that adhere to the freehold, as corn, grass, trees, plants, and the like, for they are parcel of the realty; and the severance and carrying of them away, if by one and the same continued act, is a mere trespass. And hence, it was held that calling one a thief for stealing a tree, or other thing adhering to the freehold, is not actionable, because secretly severing and carrying away such things for the sake of gain is not a felony, but a mere trespass. But now, by the act of 17th April, 1861, Pamph. L. 322, extending the local act of 30th March, 1860, throughout the commonwealth, the willful taking and carrying away of fruit, vegetables, plants, etc., whether attached to the soil or not, is declared to be a misdemeanor, and made punishable as such by fine and imprisonment. If, under the provisions of this act, taking and carrying away standing corn is no longer a mere trespass, but a misdemeanor punishable by indictment and imprisonment, it does not follow that words, charging the larceny of standing corn, are actionable. For, in order to render words spoken of a private person actionable, they must impute not only an indictable offense, but one of an infamous character, or subject to an infamous or disgraceful punishment. *Dottarer v. Bushey*, 4 Harris, 204; *Gosling v. Morgan*, 8 Casey, 273; *Stitzell v. Reynolds*, 9 P. F. Smith, 488.* If, then, the defendant, in speak-

* See on this point *Brooker v. Coffin*, 5 Johns. 188; *Wright v. Paige*, 36 Barb. 438; *Quinn v. O'Garra*, 2 E. D. Smith, 838; *Gibbs v. Dewey*, 5 Cow. 608; *Demarest v. Haring*, 6 Id. 68; *Crauford v. Wilson*, 4 Barb. 504; *Martin v. Stillwell*, 13 Johns. 275; *Van Ness v. Hamilton*, 19 Id. 331; *Alexander v. Alexander*, 9 Wend. 141; *Hoag v. Hatch*, 23 Conn. 590; *Andres v. Hoppen*

ing the words laid in the declaration, intended to charge the plaintiff with the larceny of standing corn, or "roasting ears" growing on the stalks attached to the soil, and was so understood by the persons in whose presence they were spoken, he was imputing to her an indictable offense; but he was not imputing an offense of an infamous character, or one subject to an infamous or disgraceful punishment; and, therefore, by the well-settled law, the words are not actionable. But if the defendant intended to charge her with stealing corn severed from the ground or stalks on which it grew, though it may not have been husked or garnered, the words are actionable because they impute a felony, the punishment for which the law regards as infamous. As there was evidence tending to show that the words, spoken by defendant, referred to standing corn or "roasting ears," as understood by the witness, the court ought to have affirmed the defendant's points and left it to the jury to determine whether the words, as proved by the witnesses, amounted to a charge of theft, or a mere misdemeanor, with the instruction that if the defendant, in speaking the words, intended to charge the plaintiff with stealing corn not attached to the soil, the words were actionable; but if he meant to charge her with the larceny of standing corn or "roasting ears," then the words, as they amounted only to a charge of misdemeanor, were not actionable. It is, perhaps, to be regretted that the law should make any such distinction as to the actionable character of the words. There is but little difference in the turpitude of the offense charged, in whichever sense the words may have been spoken; and there is, perhaps, as little foundation in reason or morals for the distinction which the law makes. But it exists, and cannot be gainsaid. In the one case the act is theft, in the other a trespass, or, at the most, a mere misdemeanor. And it is settled by an unbroken current of decisions, running through the whole history of the common law, that words spoken of a private person are not actionable unless they impute an indictable offense, of an infamous character, or subject to an infamous or disgraceful punishment. If a count charging a mere trespass is vicious, and will not support a judgment in slander, as we held when this case was here before, surely the proof of words, which amount only to the charge of a trespass, or mis-

hearer, 3 Serg. & R. 255; *Todd v. Rough*, 10 Id. 18; *McCuen v. Ludlam*, 2 Har. (N. J.) 12; *Johnson v. Shields*, 1 Deutcher, 118; *Giddens v. Mirk*, 4 Ga. 360; *Burton v. Burton*, 3 Iowa, 316; *Gage v. Shelton*, 3 Rich. 242; *Kinney v. Hoesa*, 3 Harr. 71; *Taylor v. Kneeland*, 1 Doug. (Mich.) 67; *Billings v. Wing*, 7 Verm. 439. See contra *Miller v. Parish*, 8 Pick. 335.—*REP.*

demeanor under the statute, will not sustain the charge in either of the courts in this case or the judgment thereon. As it respects the plaintiff's right to recover, it makes no difference whether the defect appears in the pleadings or evidence—if either shows that only a trespass or misdemeanor is charged, the plaintiff is not entitled to maintain the action.

We come now to consider the alleged errors in the charge on the question of damages. And the first matter complained of is, that the court erred in charging the jury that the damages ought not to be so low as to leave a slur on the plaintiff's character. It is urged that the jury must have regarded the instruction as binding, but taken in the connection in which it was given, we do not see that it was calculated to mislead the jury, or to stimulate them to find a greater amount of damages than they otherwise would, under the impression that the instruction was binding. The court told the jury that while the damages ought to be such as to vindicate the character of the plaintiff, they should not be so large as to injure, materially, the estate of the defendant. They ought to be sufficient to vindicate and compensate the injury sustained, and not so low as to leave a slur on her character. There is nothing in this instruction of which the defendant has any right to complain, and the error is not sustained.

But there is more of substance in the last assignment. The court charged the jury that if the evidence of Thomas Gribble is believed, the damages should be vindictive. And the reason given by the court for this instruction is: "If that evidence is believed, he concocted an infamous scheme to destroy the character of the plaintiff, and purposed carrying it out by perjury. It is true that this was after the suit was brought, and was done, no doubt, as a defense against the action." We think there was error in this instruction. It encouraged and stimulated the jury, if they believed the evidence of Gribble, to find vindictive damages not because of the malice with which the words were spoken by the defendant, as shown by his subsequent acts and declarations, but because of the infamous scheme which he had concocted to destroy the plaintiff's character, and which he had endeavored to carry out by attempting to suborn the witness. The jury should have been told that while they might consider the degree of malice with which the words were spoken, in assessing the damages, as shown by the subsequent acts and decla-

Phelan v. Moss.

rations of the defendant, they could not give damages for such acts and declarations, however infamous or criminal they might be.

For the reasons given the judgment must be reversed, and the cause sent back for another trial. Whether the plaintiffs are entitled to recover, depends upon the sense in which the words were spoken, and this is a question which the jury alone have the power to determine.

Judgment reversed, and a venire facias de novo awarded.

PHELAN, appellant, v. Moss.

(87 Penn. 58.)

Promissory note—fraud—holder for value.

The purchaser before due, and without notice, of a negotiable promissory note, fraudulent as between the original parties, gets good title thereto, although he took it under circumstances which ought to excite the suspicion of a prudent man.

Gross negligence is not enough to vitiate the title of a holder for value of a negotiable promissory note; *mala fides* must be shown.

ACTION of assumpsit brought in the court of common pleas, on a promissory note, by Phelan against Moss. The note was as follows:

"Six months after date I promise to pay George W. Benton, or bearer, \$250, for value received, with use, without defalcation.

"TOWNSHIP OF ALEPPO, dated June 10, 1868.

"JENNINGS J. MOSS."

Upon the note were fifteen cent stamps canceled by writing, June 10, 1868. It appeared from the evidence that the note was obtained under the following circumstances: In June, 1868, defendant met Benton, who was riding in a carriage, and was asked by him to become an agent for selling washing machines, to which defendant consented, whereupon Benton presented an agreement or contract of agency, as defendant supposed, and which was signed by defendant without reading it. Defendant testified that he saw no stamps on the paper which he signed. The paper signed by defendant contained the note in suit. Plaintiff purchased it Novem-

Phelan v. Moss.

ber 16, 1868, from a man "who said his name was Goff, he gave \$100 for it; Goff said he did not know what the note was given for, he had got it in New York, in a trade." The following are the requests to charge, and the charge to the jury so far as are relevant to the proper understanding of the case. The plaintiff requested the court to charge:

"2. That if the jury believe the evidence of H. R. Phelan, they may find from it that he had paid \$100 in cash for the note when he bought the same, and that he bought it, before maturity, of one W. B. Goff, and that neither he nor Goff had notice of the circumstances under which the note was given, and there was nothing in the conduct of W. B. Goff which suggested to R. H. Phelan that the note had been obtained from the defendant unfairly; and if they so find the facts, the plaintiff is entitled to recover the amount of the note, even if the jury should believe the same was procured from the defendant by George W. Benton by fraud and false representations.

"3. That the note in suit being payable to George W. Benton, or bearer, and having before maturity been in the possession of W. B. Goff, against whom there is no evidence of notice of the original transaction, or of circumstances to put him upon inquiry, the law protects it in the hands of every subsequent holder for value, and the plaintiff is entitled to recover the amount of the same, notwithstanding all the facts relied upon as a defense in this case."

The court refused the points, and charged:

"If the defendant did not sign the note, there is an end of the case, and the plaintiff cannot recover. But if you find he did make the note, other questions arise.

"The uncontradicted evidence is, that Moss received no consideration, but the whole was a fraud and swindle. But it is strictly a commercial note — what is negotiable paper, and came into possession of the plaintiff before it was payable and for valuable consideration, can the defendant resist the payment of the note in the hands of the plaintiff? We have allowed evidence to go to you which we think, if believed, should have put plaintiff upon inquiry; this inquiry strictly pursued would have let him into a knowledge of the fraudulent character of the note. There was no indorsement on the note. Goff, the negotiator, was a stranger. It was purchased by plaintiff for \$100. The note was for \$250, and the drawer known to be solvent. The stamps not properly canceled,

Phelan v. Moss.

no initials of name upon them, and in fact no cancellation whatever. No evidence that the immediate holder before this sale, or any one before him, had paid valuable consideration for the note. If you find these are the facts, it is our opinion, and we so instruct you, that the plaintiff cannot recover."

Verdict for defendant.

Plaintiff removed the case to the supreme court.

A. A. Furman, for appellant, cited, Story on Prom. Notes, § 197, and notes; *Goodman v. Stephens*, 4 Ad. & E. 870; *Belmont State Bank v. Hoge*, 6 Am. Law Reg. N. S. 280; *Raphael v. Bank of England*, 83 Eng. Law & Eq. 276; *Worcester Bank v. Dorchester Bank*, 10 Cush. 488; *Goodman v. Simonds*, 20 How. 843; *Bay v. Coddington*, 5 Johns. 54; *Ellicott v. Martin*, 6 Md. 509; *Matthews v. Poythress*, 4 Ga. 287; *Mages v. Badger*, 30 Barb. 246; *Snyder v. Riley*, 6 Barr, 168; *Hutchinson v. Boggs & Kirk*, 4 Cas. 294; *Milner v. Dawson*, 5 Exch. 948; *Allaire v. Hartshore*, 1 N. J. 665; *Chicopee Bank v. Chaquin*, 8 Met. 40; *Youngs v. Lee*, 18 Barb. 187; *Simpson v. Clark*, 2 Cromp. M. & R. 342; *Brown v. Mott*, 7 Johns. 861; *Edwards v. Jones*, 7 Car. & P. 638; *Swift v. Tyson*, 16 Pet. 15; *Bosanquet v. Dudmon*, 1 Stark. 1; *Ex parte Bloxham*, 8 Ves. 531; *Haywood v. Watson*, 4 Bing. 496; *Braman v. Roberts*, 1 Bing. New Cases, 479; *Brush v. Scribner*, 11 Conn. 388; 3 Kent's Com. 81; *Beltzhoover v. Blackstock*, 3 Watts, 24; *Besbing v. Graham*, 2 Harris, 14; *Bullock v. Wilcox*, 7 Watts, 328; *Harrisburg Bank v. Meyer*, 6 S. & R. 537; *Knight v. Pugh*, 4 W. & S. 445; *Whittaker v. Edmonds*, 1 M. & R. 366; *Morris v. Langley*, 19 N. H. 423; *Power v. Ball*, 27 Vt. 662; *Lord v. Ocean Bank*, 8 Harris, 364; *Callen v. Fawcett*, 8 P. F. Smith, 113; Story on Prom. Notes, § 191; *Edwards on Bills and Notes*, 294; *Italy v. Lana*, 2 Atk. 182; *Chalmers v. Lanior*, 1 Cow. 383; *Robison v. Reynolds*, 2 Ad. & E. N. S. 196.

E. M. Sayers, for appellee, cited 3 Kent's Com. 82; *Snyder v. Riley*, *supra*; *Bay v. Coddington*, 5 Johns. Oh. 56; *Ayers v. Hutchins*, 4 Mass. 370.

READ, J. The law of bills of exchange owes much of its scientific and liberal character to the wisdom of the great jurist of his age, Lord MANSFIELD, who was sometimes in advance of his contem-

poraries in attempting to introduce equitable principles in suits at common law. What was then disapproved would now be approved; and Lord PENZANCE in the house of lords supported the proposition, that when law and equity conflicted, the equitable principle should prevail.

Sixteen years before the American revolution, Lord MANSFIELD held, in *Miller v. Race*, 1 Burr. 452, that bank notes, though stolen, became the property of the person to whom they are *bona fide* delivered for value, without knowledge of the larceny. Forty-three years afterward, in *Lawson v. Weston*, 4 Esp. 56, Lord KENYON held, that if a bill has been lost, and the loser has advertised it in the papers, and it is discounted for the person who found it, and so came fraudulently by it, this entitles the person discounting it to recover the amount, if done *bona fide*, and without notice of the way in which the holder became possessed of it. Lord KENYON said: "I think the point in this case has been settled by the case of *Miller v. Race*, in Burrow. If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce."

The principle established by these decisions remained the undoubted law of England for sixty-six years, until Lord Chief Justice ABBOTT, in *Gill v. Cubitt*, 2 B. & C. 466, propounded the novel and dangerous doctrine, that although the holder had given full value for the bill, if he took it under circumstances which ought to have excited the suspicion of a prudent and careful man, he could not recover. The lord chief justice said, "for these reasons, notwithstanding the unfeigned reverence I feel for everything that fell from Lord KENYON, by whom *Lawson v. Weston* was decided, I cannot think the view taken by that learned lord at that time was the correct one." This cautious ruling, although carped at and quarreled with, remained the law for ten years, when the discredit of the Bank of England bills on the continent, and the complaints of the commercial community, brought the matter before the king's bench—which had been remodeled—for consideration: *Crook v. Jardis*, 5 Barn. & Ad. 909; and *Backhouse v. Harrison*, id. 1098, were followed by *Goodman v. Harvey*, 4 Ad. & E. 870, in which Lord DENMAN said, "we have shaken off the last remnant

of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

In the ninth edition of Chitty on Bills, by Chitty and Hulme, published in 1848, it is said, "and the case of *Goodman v. Harney* has since finally decided, that even *gross negligence* is not alone enough to destroy the title of a holder for value; but that a case of *mala fides* on the part of such holder must be made out in order to defeat his claim. So that the doctrine of Lord TENTERDEN is now completely exploded, and the old rule of law, 'that the holder of bills of exchange indorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess to a person taking them *bona fide* for value,' 'is again re-established in its fullest extent.'"

The same doctrine is repeated in the tenth edition by Russell and MacLachlan, of 1859, p. 179; and also in Byles on Bills, fifth American, from the ninth London, edition, with notes by my brother SHARSWOOD, p. 280.

The rule therefore adopted by the English courts one hundred and twelve years ago, and which has stood the test of the practice and experience of the greatest commercial country of modern times, is now the undisputed and settled law of England.

In *Brush v. Scribner*, 11 Conn. 388, Chief Justice WILLIAMS, in 1836, in the course of a long and learned opinion, asserted the same doctrine, quoting *Miller v. Race*, *Crook v. Jadis*, and *Backhouse v. Harrison*, in support of it. In *Worcester County Bank v. Dorchester and Milton Bank*, 10 Cush. 488, in 1852, the supreme court of Massachusetts, quoting *Goodman v. Harvey* and kindred cases, held, that if he took the bill in good faith he is entitled to recover on it. "The burden of proving good faith is all the burden which the law imposes on him."

In *Hall v. Wilson*, 16 Barb. 548, in 1853, Judge ALLEN, citing *Crook v. Jadis* and the subsequent cases, says, "the doctrine of the cases last cited has been adopted and approved by the courts of some of the States of the Union, and I have met with no case in our own courts in conflict with it." This case is recognized in *Magie v. Baker*, 30 Barb. 246.

In *Swift v. Tyson*, 16 Peters, 1, it was held that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of the facts which impeach its validity as

Phelan v. Moss.

between the antecedent parties, if he takes under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity; and it was also held that the holder of negotiable paper before it is due is not bound to prove that he is a *bona fide* holder for a consideration, without notice; for the law will presume that, in the absence of all rebutting proof, and therefore it is incumbent on the defendant to establish, by way of defense, satisfactory proof of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

In *Goodman v. Symonds*, 20 How. 343, these principles were again affirmed, by the unanimous opinion of the supreme court of the United States, recognizing the decision of *Goodman v. Harvey* in its fullest extent.

This doctrine is approved in Story on Bills of Exchange, § 416; Edwards on Bills, 506; 2 Parsons on Bills, 277, 278, 279; and in the 6th edition of Story on Prom. Notes, 1868, § 382. The statements in Judge STORY's works on bills of exchange and promissory notes, we know, by *Swift v. Tyson*, to have been his deliberately formed opinions.

There are no reported cases in Pennsylvania on bills of exchange and promissory notes prior to the revolution, and but nine in 1 Dallas, twenty-one in the three other volumes, and fourteen in the four volumes of Yates. In *The Bank of North America v. McKnight*, 2 Dal. 158, in 1792, Chief Justice KEAN said, "before the revolution it was not usual to give notice to the indorser as soon as a note became due; it would have been considered as harsh and unreasonable. But since the establishment of the bank, a rule has been introduced; and as these notes lodged in the bank were often accommodation-notes, was highly reasonable that notice should be given in a *short* time. What that time ought to be has not been determined. Two or three months would certainly be too long, and a day may be too short. I would not *singly* lay down a rule, but leave it to the jury as a question of fact." The notice given in this case was four or five days after the note became due, which was in 1786, and the verdict was for the plaintiff.

The seat of the general government, from 1790 to 1800, was in Philadelphia, and it speedily became a place of great commercial importance. In order to give promissory notes made in Philadel-

phia, in a particular form, their full commercial value, the act of 27th February, 1797, making them not liable to any plea of defalcation or set-off, was passed, which act was rendered useless by the decision of the supreme court, in 1838, in *Bullock v. Wilcox*, 7 Watts, 328, restoring the universal commercial law to all promissory notes made in any part of the State.

I am aware that Judge SERGEANT, in *Beltzhoover v. Blackstock*, 3 Watts, 20, in September, 1834, before the cases shaking *Gill v. Cubitt* were published in America, and a year and a half before it was overruled, used this language: "And I concur in the position that if an indorsee takes a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defense: *Gill v. Cubitt*, 3 B. & C. 466; 3 Kent's Com. 53." But the principle thus stated was not necessary to the decision of the case before the court, nor was it used by the learned judge, but he used expressions looking to the older doctrine, as "it would be hard to subject a man to the consequences of *mala fides*, when perhaps he never had knowledge of the matter alleged." The citation of 3 Kent's Com. 53, is from the first edition, published in 1828, when Lord TENTERDEN's doctrine was apparently the law of England. In the 3d edition of 1836, p. 82, the text was left unaltered, but in a note, *Backhouse v. Harrison*, *Crook v. Jadis*, and 2 Myl. & K. 638, are cited, with the remark, "so that the case of *Gill v. Cubitt* seems to be somewhat weakened." In the 4th edition, 1840, p. 82, the same note is preserved, with the addition of *Goodman v. Harvey*. All of these editions were edited by Chancellor KENT.

In the preface to the 9th edition of Chitty on Bills, published in 1849, the editors, Messrs. Chitty and Hulme, say: "Of the various decisions which have taken place on the bills of exchange, perhaps the most important are those which establish, in contradiction to the doctrine laid down by Lord TENTERDEN, that the claim of a *bona fide* holder of a bill which has been lost or fraudulently obtained is not to be defeated by his having taken it under *circumstances which ought to have excited the suspicion of a prudent man*; but that in order to destroy the holder's title, he must be shown to have taken the instrument *mala fides*. The rule thus established not only relieves bills and notes from the clog, which a contrary doctrine is calculated to impose on their negotiability, but presents at once a clear and intelligible question for the consideration of a

jury; while to leave it to a jury to determine as to the degree of caution which a prudent man must exercise on taking such an instrument, leads to much perplexity and frequent injustice."

In the eleventh edition of Kent's Commentaries by Judge COMSTOCK, in 1866, vol. 3, p. 103-4, here is added to the note, "so that the case of *Gill v. Cubitt* seems to be somewhat weakened, if not destroyed." "Mr. Justice STORY (Story on Bills, 216) considers the doctrine in *Gill v. Cubitt* as absolutely overruled and abandoned."

The case of *Gill v. Cubitt* was decided whilst Chancellor KENT was lecturing and writing his Commentaries, and he took the doctrine of an eminent judge, Lord TENTERDEN, as a correct exposition of the English law, without any thorough examination, and without the aid of the subsequent decisions, restoring the rule of Lord MANSFIELD.

In *McLaughlin v Commonwealth*, 4 Rawle, 464 (21st February, 1834), which was an indictment for stealing three promissory notes, commonly called bank notes, on the Bank of the United States, Judge KENNEDY, speaking of notes which had not been issued, or if issued had been paid in, being robbed or stolen from the bank, said, "for I have no doubt but the bank would be liable to pay notes thus stolen from it, after they had come into the hands of *bona fide* holder, although they might have received them from the thief." "Being in negotiable form, and for the payment of money, they are considered as part of the circulating medium of the country, and the man who is about to receive them in payment, in the ordinary course of his lawful business, is no more bound to inquire how and by what means the holder came by the possession of them, and whether they were obtained from the bank by its consent or not, than he is bound to inquire of his debtor who offers to pay him in dollars coined at the mint of the United States, how he came by them, and whether or not they were obtained lawfully from the mint."

Taken in connection with the case of *Bullock v. Wilcox*, cited above, where it was held that "the *bona fide* holder for value and without notice of a negotiable note made to A. B., or bearer, is entitled to recover on it against the maker, free from all subsisting equities between the original parties, and particularly considering the language of the learned judge (KENNEDY) in delivering the opinion of the court, there is little doubt of the approval of the

old doctrine of *Miller v. Race*, and I can draw no other conclusion from the language used by Judge ROGERS in *Bisbing v. Graham*, 2 Harris, 14."

The law is clearly stated in 1 Smith's Leading Cases, vol. 1, part 2, p. 749, 750, *Ans. &c.*, 1866, and at 752, in the American note, it is said, "in *Dickson et al. v. Primrose et al.*, 2 Miles, 366, it is said that the plaintiff must prove he gave full consideration, 'and in some cases he must even show that he took it without any circumstances of suspicion, or his ownership will not be held *bona fide*.' But in a later case that court adopted the principle of *Backhouse v. Harrison*, and decided that the defendant must prove fraud." The case in 2 Miles was decided on the 11th January, 1840. It was upon a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense, which disclosed a case in which as between the original parties to the bill the drawee could not have recovered. It is clear this would call on the holder to prove value, and this was a sufficient reason to refuse judgment. The other case was that of a stolen note from a counting-house in Philadelphia, and sold by a stranger, at Harrisburg, to a respectable lawyer at a considerable discount, and I gained the cause by having in my possession the only copy of the ninth edition of Chitty on Bills, in the city. I believe this ruling has been uniformly followed by that court.

It has been held in several cases, and is undoubted law, that the indorsee in a suit by him against the maker of a promissory note, cannot be called on to prove consideration, until the defendant has shown it was obtained or put into circulation by fraud or undue means. *Knight v. Pugh*, 4 W. & S. 445; *Brown v. Street*, 6 id. 221; *Hutchinson v. Boggs & Kirk*, 4 Cas. 294; *Gray's Admrs. v. Bank of Kentucky*, 5 id. 365.

In the case before us the evidence clearly shows that the defendant, induced by the promise of being an agent to sell Benton's patent washing-machines, signed a note "payable six months after date to George W. Benton, or bearer, for \$250, for value received, with interest, without defalcation. Township of Aleppo, dated June 10, 1868." The young man to whom he gave it is described at twenty or twenty-five years of age, had a two-horse buggy, with dark chestnut mares, and said he was agent for selling washing-machines of a man of the name of Benton. The allegation of the defendant is that he signed a contract, but not the note. But it is

Phelan v. Moss.

clear he signed the note, but under circumstances which would prevent a recovery between the original parties.

Assuming that it was a fraud, then the question recurs, was the plaintiff a *bona fide* holder for value, without notice of the fraud. It was purchased by him on the 16th November, 1868, from a man who said his name was W. B. Goff, who gave him a receipt showing the amount paid him for the note. He gave him \$100 in cash for the note. "He told me he did not know what the note was given for; said he had got it in New York on trade. The man was fifty or fifty-five years of age. He said he resided in the State of New York." There is no evidence that the plaintiff had any notice of the fraud, nor that Goff had, nor, according to the defendant's story, had he any notice or knowledge of it at that time.

The cause was tried by the learned judge upon a misconception of the law, as appears by his answers to the second and third points, and by his charge to the jury.

The learned judge said, "We have allowed evidence to go to you, which we think, if believed, should have put the plaintiff upon inquiry. This inquiry strictly pursued would have let him into a knowledge of the fraudulent character of the note." This could not have been ascertained except by going to the maker himself. This is not the law, nor are the subsequent objections. "There was no indorsement on the note." It was payable to bearer, and the holder gave a receipt for the amount paid. "Goff, the negotiator, was a stranger;" this is no objection. "It was purchased by plaintiff for \$100, the note was for \$250 and the drawer known to be solvent," nor is this; nor that in canceling the stamp the initials were omitted. The most extraordinary, however, is the objection that no "evidence that the immediate holder before this sale, or any one before him, had paid valuable consideration for the note," a doctrine that would put an end to all negotiable paper. Neither one nor all these facts, if found by the jury, proved *mala fides* on the part of the holder, or brought home to him knowledge of the fraud; but, on the contrary, it was clear that he was a *bona fide* holder for value without notice, and, of course, entitled to recover.

The court were, therefore, wrong in instructing the jury that the plaintiff could not recover.

Judgment reversed, and venire de novo awarded.

NOTE.—See *Gould v. Stevens*, *ante*, wherein a contrary doctrine is held.—RMR.

GARRARD, appellant, v. HADDAN.

(87 Penn. St. 82.)

Promissory note—alteration—fraud—holder for value.

The maker of a promissory note, in the usual form, is negligent in leaving a blank between the words indicating the amount for which the note is drawn, and the word "dollars;" and, although the blank is fraudulently filled up after delivery, so as to increase the amount, the alteration being imperceptible, the maker is liable to an innocent holder for value, for the face of the note.

ACTION on a promissory note by Haddan, holder for value, against Garrard, maker. The note in suit is as follows:

"LUZERNE, October 6, 1868.

"On or before the 1st day of August, 1869, for value received, I promise to pay J. K. O'Neil, or bearer, one hundred and fifty dollars, with use, without defalcation, or stay of execution. And hereby waive the benefit of the exemption, and stay laws and requisition on real estate.

"JOSEPH G. GARRARD.

"Payable at the *First National Bank of Brownsville.*"

The words "*and fifty*" had been inserted in the note after its delivery, without consent of the maker, the space now occupied by those words having been left blank by the maker. The plaintiff took the note before due, in its present state, and had no knowledge of the alteration. The jury found a special verdict for \$162, with leave to the court, *non obstante veredicto*, to decide the reserved question, whether the alteration of the note vitiated it in the hands of an innocent holder for value in whole, or only to the extent of the alteration. The court directed judgment for plaintiff for \$103, being the amount of the note as actually given by the defendant, together with costs. Defendant appealed.

A. C. Nutt and *D. Kaine*, for appellant, cited 1 Greenl. Ev., § 565; Chitty on Cont. 297; *Bank of United States v. Russel*, 3 Yeates, 391; *Stephens v. Graham*, 7 S. & R. 508; *Simpson v. Stackhouse*, 9 Barr, 186; *Miller v. Gilleland*, 7 Harris, 124; *Struthers v. Kendall*, 5 Wright, 229; *Southworth Bank v. Gross*, 11 Casey, 80; *Hill v. Cooley*, 10 Wright, 261; *Neff v. Horner*, 13 P. F. Smith, 327.

C. E. Boyle, for appellee.

Garrard v. Haddan.

THOMPSON, C. J. There could be no question but that the alteration made in the note in this case would avoid it as between the maker and payee, the consent of the latter to it being wanting, and there being neither an implied nor express authority for making it.

But how is it with the plaintiff, an innocent holder for value in the usual course of business? There was a blank in the body of the note (a printed note) between the words "one hundred" and "dollars," when the maker signed and delivered it. The payee afterwards filled the blank with the words "*and fifty*," which made the note read "one hundred and fifty," instead of "one hundred dollars," the sum for which it was drawn. In this condition it was taken by the plaintiff without the least grounds existing for any doubt of its entire genuineness. "By inspection of the note," says the learned judge in his opinion on the reserved question, "the most skilled expert would have failed to detect any alteration in its make." There was no difference in the handwriting between the words added and those which preceded them; no difference in the ink, and no crowding of words, to put the most careful man on inquiry, or to raise a suspicion that all was not right. The note, thus clear on its face, was taken on the credit of the drawer, and now shall he be discharged from his obligation by reason or on account of his own negligence in delivering a note that invited tampering with? He could have saved all difficulty by scoring the blank with his pen. It would have been impossible almost to have written over this without leaving traces of the alteration. In that case a purchaser of the note would take it at his own risk. This is, therefore, one of the cases in which it is a maxim, "that where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss." Story's Eq., § 387. "If a bill or check be drawn in so careless a manner as thereby to enable a third person to practice a fraud, the customer and not the banker must bear the loss." Chitty on Bills, § 60; Byles on Bills, 332; 22 Eng. L. and Eq. 516; 31 Barb. 100; 41 ib. 465. "A party who intrusts another with his acceptance in blank is responsible to a *bona fide* holder, although the blank be filled with a sum exceeding that fixed as a limit by the acceptor. Though the filling of the blank in violation of the agreement of the parties be a forgery, the acceptor is estopped from setting up the fact. 7 Smith (N. Y. Rep.), 531. DENIO, J., in delivering the opinion of

Garrard v. Haddon.

the court of appeals in this case, says, among other things, "that the principle which lies at the foundation of these actions, I think, is, that the maker who by putting his paper in circulation has invited the public to receive it of any one having it in possession with apparent title, is estopped to urge the *actual defect* of title against a *bona fide* holder."

The doctrine of the point is ably discussed by the learned judge, and the cases touching the subject are noticed and discussed. The doctrine is, however, but an elaboration of a great principle of justice, that if one by his acts, or silence, or negligence, misleads another, or in any manner affects a transaction whereby an innocent person suffers a loss, the blamable party must bear it. Story's Eq. 386, 387.

In *Young v. Grote*, 4 Bing. 253, and also reported in 12 Moore, 484, the very case in principle with the one in hand may be found. It was an alteration by filling spaces or blanks negligently left in a check, and filled by the holder so as to increase the amount and not be detected by inspection of the paper. The bank paid it, and the drawer was held chargeable for the full amount on the ground of his negligence. The same doctrine was held in two Scotch cases, viz.: *Ragore v. Wylie*, and *Graham v. Gillespie*, to be found in full in Ross on Bills and Promissory Notes, 104-95. It is true, in 1st Allen (Mass.), 561, the case of *Wade v. Whittington* seems to limit the doctrine to cases where the alteration is made by an agent, clerk or confidential party; but this, in my opinion is against an earlier decision in that State—I refer to *Putnam v. Sullivan*, 4 Mass. 45, in which no such restriction appears. It seems an impracticable limitation.

In *Hall v. Fuller*, 5 B. & C. 750, the case was that of an alteration of a bill *perceptible* on its face. The bankers paying it were allowed only to charge the drawer with the original amount put in the draft, for it was negligence on their part to pay the face of it in its altered aspect. Such seems to have been the doctrine applied by this court in *Worrall v. Gheen*, 3 Wright, 388; although the case of *Hall v. Fuller*, asserting the same doctrine, does not seem to have been cordially approved in that opinion.

I regard this case as depending on the principles of the other cases cited above, and not on *Worrall v. Gheen*. That was a case of a perceptible alteration, and the plaintiff was allowed to recover only to the extent of the original unaltered note, the plaintiff

Schnorr's Appeal.

being entirely innocent of the alteration, or of knowing anything about it. But in the case in hand there was no perceptible alteration on the face of the note whatever. The handwriting was all the same, and no crowding of words to effect the insertion—all was natural and regular in appearance. The words "and fifty" were inserted in the space between the words "one hundred" and the word "dollars" in the note, by the same hand that filled up the note originally. It had been delivered to plaintiff in this condition. The authorities I have referred to hold the drawer of such a note answerable for the full face of the note as altered, to any *bona fide* holder of it for value, on the ground of the negligence of the maker in leaving the blank in the note which was thus filled up after its execution, and so we now hold, notwithstanding, as between the maker and payee or other person making the alteration, it would be a forgery and void.

We think this rule is necessary to facilitate the circulation of commercial paper, and at the same time increase the care of drawers and acceptors of such paper, and also of bankers, brokers and others in taking it. This rule will not apply to cases where the alteration is apparent on the face of the paper. There it is possible the rule in *Worrall v. Gheen* may apply. The only error, therefore, which we discover in the judgment on the reserved question, was against the defendant in error. By the rule which I have endeavored to deduce from the cases, he was entitled to judgment for the face of the note and interest. But the defendant in error is not a complainant here, and the plaintiff in error makes no complaint that the judgment against him is too small, and therefore the judgment is affirmed.

Judgment affirmed.

 SCHNORR'S APPEAL

(97 Penn. St. 122.)

Ecclesiastical law — dissension — title to church property.

The title to the church property of a divided congregation is in that part, though a minority, which adheres to the ecclesiastical laws, usages and principles of the denomination under which the church was constituted.

Schnorr's Appeal.

BILL in equity (filed March 12, 1870), to the court of common pleas, by William H. and William F. Miller, elders, and Henry Kalb, deacon of "The German Evangelical Reformed St. Paul's Church, of Butler, Pennsylvania," against Schnorr *et al.* The facts are briefly as follows: The above mentioned church was incorporated by the court of common pleas of Butler county. The charter recites that the subscribers, with others, had "associated for the purpose of worshiping Almighty God according to the faith and discipline of the German Evangelical Reformed Church in the United States of America."

In the third section of the first article, it is provided that "it shall be subject to the control of the Synod of the German Reformed Church of the United States, and shall, in all respects, be governed by its rules and regulations." By the fourth section of the third article, it is provided "that every minister of the gospel who may become a candidate for the office of pastor, must, before he can be chosen to, or at least before he can be inducted into office, be in good standing in connection with the Synod of the German Reformed Church." Article five is as follows:

"The consistory may, from time to time, enact such by-laws for their government in the transaction of business as they may deem necessary; provided, however, that they do not conflict with this constitution, or the consistory of the German Reform Church, etc.

"Reference is made to the constitution of the German Reformed Church for full particulars. This congregation was organized only as a German Evangelical Reformed Congregation in Butler, Butler county, Pennsylvania, and that it be known hereby that no alteration can be made in this congregation for another denomination."

A church building was erected, by the society formed under this charter, with funds raised by voluntary contribution from the subscribers, upon a lot given for the purpose. The defendants, on the 22d of November, 1869, by an instrument of writing, declared themselves independent of all synods, absolved themselves from the government of the German Reform Church, and elected a clergyman, as pastor, not connected with the German Reform Church. Defendants being in the majority, also took possession of the building. Those who were dissatisfied with these proceedings withdrew, and on Easter Monday, 1870, the day fixed in the charter, held an election at the Orphans' Home, at which plaintiffs were chosen members of the consistory, and they now file this bill to

Schnorr's Appeal.

obtain possession of the building. The defendants, on the 18th of March, 1870, rescinded their proceedings of November 22, 1869, and held a meeting at the church, and elected a consistory. There was no provision in the charter as to the place where the election should be held. The prayer of the plaintiffs was granted. Defendants appealed to the supreme court.

C. McCandless (with whom was *J. M. Thompson*), for appellants, cited *Suter v. The Reformed Dutch Church*, 6 Wright, 503; *Winebrenner v. Colder*, 7 id. 244.

J. Bredin, for appellees, cited *Den v. Bolton*, 7 Halsted, 214.

SHARSWOOD, J. When property, real or personal, is vested in a religious society, whether incorporated or not, as a church or congregation for the worship of Almighty God and the promotion of piety and godly living, it is a charitable use, whether the donors be one or many. The corporation or society are trustees, and can no more divert the property from the use to which it was originally dedicated, than any other trustees can. If they should undertake to divert the funds, equity will raise some other trustee to administer them, and apply them according to the intention of the original donors or subscribers. When the founders or donors have clearly expressed their intention that a particular set of doctrines shall be taught, or a particular form of worship and government maintained, it is not in the power of individuals having the management of the institution, at any time to alter the purpose for which it was founded. When a church has been organized, and been endowed, whether by donation or subscription, as belonging to any particular sect, or in subordination to any particular form of church government, it cannot break off from that connection and government. *The Attorney-General v. Pearson*, 3 Merival, 352. When, however, it is not described, in the original donation or terms of subscription, as in connection with or under the ecclesiastical jurisdiction of any particular body of believers, it may change its relation, provided there be in such change no radical departure from the original faith or doctrine. *The Presbyterian Congregation v. Johnston*, 1 W. & S. 9; *Lutheran Congregation of Pine Hill v. St. Michael's, etc., of Pine Hill*, 12 Wright, 20.

In church organizations, those who adhere and submit to the

regular order of the church, local and general, though a minority, are the true congregation and corporation, if incorporated. *Winebrenner v. Colder*, 7 Wright, 244. The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standards for determining which party is right. *McGinnis v. Watson*, 5 Wright, 9. If the opinion of Chief Justice LOWRIE, in this last case, may seem to controvert any of these positions, and to hold that a congregation may change a material part of its principles or practices without forfeiting its property, on the ground that to deny this "would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life," and because the guarantee of freedom to religion forbids us to understand the rule in this way, I ask leave most respectfully to enter against it my dissent and protest. I do so the more freely because it was entirely extra-judicial to any question in the case. Courts which have the supervision and control of all corporations and unincorporated societies or associations, must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land.

The application of the principles settled in the adjudications cited, to which many others might be added, to the case brought before us on this appeal is very easy. The German Evangelical Reformed St. Paul's Church of Butler, Pennsylvania, was incorporated by the court of common pleas of Butler county. The charter recites that the subscribers with others had "associated for the purpose of worshipping Almighty God according to the faith and discipline of the German Evangelical Reformed Church in the United States of America," and in the third section of the first article it is expressly provided that "it shall be subject to the con-

Schnorr's Appeal.

trol of the Synod of the German Reformed Church of the United States, and shall, in all respects, be governed by its rules and regulations;" and the fourth section of the third article declares that "every minister of the gospel who may become a candidate for the office of pastor, must, before he can be chosen to, or at least before he can be inducted into office, be in good standing in connection with the Synod of the German Reformed Church." As though to obviate all possible doubt or question upon the subject, the last paragraph of the charter expressly declares: "This congregation was organized only as a German Evangelical Reformed Church in Butler county, Pennsylvania, and, that it be known hereby, that no alteration can be made in this congregation for another denomination." Under a charter thus carefully guarded, the building, which is the bone of contention here, was erected with funds raised by voluntary contribution from the subscribers upon a lot given for the purpose. It is unnecessary to refer to the troubles in the church, or to pass any judgment upon the acts of either party. The defendants, on the 22d of November, 1869, by an instrument of writing declared themselves independent of all synods, and absolved from the government of the German Reformed Church, and elected a clergyman as pastor not connected with the German Reformed Church. They took and held possession of the building. Those who were dissatisfied with the proceedings withdrew, and on Easter Monday, 1870, the day fixed in the charter, held an election at the Orphan's Home, at which the plaintiffs were chosen members of the consistory, and they now file this bill to obtain possession of the building. The defendants also held a meeting at the church on the same day, and elected a consistory. There can be no question that the plaintiffs and those whom they represent were on Easter Monday, 1870, the true church adhering to the ecclesiastical order and denomination under which the organization originally took place, and the articles of which organization impressed it expressly with a law which forbade its ever becoming disconnected with that denomination. No provision in the charter required the election of the consistory to be at the church, and the wrongful act of the defendants in holding possession dispensed, so far as they were concerned, with the necessity of any notice, in the church, of an election to be held elsewhere. It does not lie in the mouth of the defendants to object in any way in this proceeding to the regularity of the election of the plaintiffs. The defendants are

Dickens' Case.

strangers. They made themselves so by their solemn act, throwing off their connection with the German Reformed Church. That they then seceded and withdrew from the church cannot be doubted. How, then, can their meeting afterward and rescinding the resolution of secession restore them to membership, much less constitute them the true church, and authorize them to elect a consistory?

The plaintiffs, and those whom they represent, were the true church; with them the defendants ought to have reunited, if, as they contend, they had not lost their membership, and voted at their election. It is clear, then, that the plaintiffs had the legal right to the possession and control of the church property, and that the decree below was in all respects proper.

Decree affirmed and appeal dismissed at the cost of the appellants.

DICKENS' CASE.

(67 Penn. St. 169.)

Attorney — expulsion from bar.

Participation, by an attorney, in making pretended gifts as a means of giving notoriety to an exhibition, innocent in itself, is not sufficient ground to authorize his name to be stricken from the roll.

An attorney, who conspires to get an opposing attorney drunk, in order to gain an advantage in a cause about to come on, is liable to expulsion from the bar therefor.

CERTIORARI to the court of common pleas, of Alleghany county. The opinion states the case.

Morelang, Moore & Kerr, and Weir & Gibson, for certiorari.

AGNEW, J. This case comes before us under a special act of assembly, approved the 15th day of March, 1870, authorizing us to take jurisdiction of it, and to proceed to hear and determine all questions of law and fact arising upon the record and proceedings in the cause. The name of J. Charles Dickens, an attorney of the several courts of Alleghany county, was, on the 26th of September 1864, stricken from the roll of attorneys of the several courts of common pleas, oyer and terminer, quarter sessions, and orphan's court. This resulted from an investigation ordered by the court of

Dickens' Case.

common pleas, upon the petition of members of the bar, charging Mr. Dickens with misbehavior in his office, as an attorney, upon three specifications, to wit: Participating in the exhibition of "Russell's Panorama of the Rebellion," and making pretended gifts at the close of each exhibition of valuables, as an inducement to draw full houses—acting in bad faith and fraudulently, in procuring the extension of the real estate of John F. Perry, under execution, with a view to hinder and delay his *bona fide* creditors—and soliciting a member of the bar to make another member drunk, for the purpose of obtaining an unfair advantage in the postponement of a cause in which Dickens was attorney.

After a careful examination of the records and testimony in the case, we are of opinion that the third charge only is sustained. The first fails in point of law, and the second in point of fact. However unprofessional the conduct of Mr. Dickens was, in relation to the exhibition of "Russell's Panorama," and we think it indefensible, his conduct on that single occasion ought not to be the ground of expulsion from his office of attorney. The doctrine of *Austin's Case*, 5 Rawle, 191, is, that the power of the court may be exercised against attorneys-at-law, either for a contempt which is an offense against the court itself, or for unfitness which disqualifies the attorney from filling the office properly. In the present case, no contempt was committed, and the expulsion rests upon the charge of unfitness to exercise the office of an attorney. If an attorney should by a series of unprofessional acts, disgraceful to him as a man, form a character which unfits him for association with the fair and honorable men of the profession, and disqualifies him from receiving the confidence of men of integrity, bringing reproach upon himself, and upon the profession to which he belongs, we will not say such unfitness, the result of habitual practices, cannot be made the subject of inquiry by the court and expulsion from the bar. But certainly an act merely discreditable, but not infamous, such as a participation in making pretended gifts as a means of giving notoriety to an exhibition, innocent in itself, while it would lose a member of the bar the favor and countenance of the high-minded men of the profession, cannot of itself give jurisdiction to the court to take judicial cognizance of it, and expel him from his office. To admit such a power, would expose the members of the bar to the whims, caprice, peculiar views, and prejudices of judges. The office of an attorney is too important to him, to those dependent on his efforts, and to

Dickens' Case.

the public, to be thus at the mercy of any one. The preparation of years to enable one to practice, and the prospects of a lifetime, ought not to be in the power of men, however upright, to blast, who, from peculiarity of disposition, or habits of thought, may exercise the power unjustly. *Austin's Case* is a forcible illustration of the thought just expressed. We are of opinion, therefore, that the first specification, though true in fact, was insufficient in law to support the order of expulsion.

The second specification is unsupported by the evidence, and we need take no further notice of it.

But the third, we regret to believe, is well supported. The testimony of C. B. M. Smith, Esq., a highly respectable member of the bar, does not apply to the same time and place testified to by Mr. Linn. The conversation between Dickens and Linn, in which the former told the latter of his purpose to make Mr. Whitesell, his opposing attorney, drunk, in order to beat him in the next cause coming on, and proposed to him to take Whitesell out and give him another drink, occurred in the court-room, and while the court was sitting. The conversation to which Mr. Smith refers took place in Dickens' office. No doubt Mr. Smith thought at the time it was a joke on the part of Dickens; but the testimony of Mr. Linn, as to the occurrence in the court-room, leaves a very different impression on our minds; and the facts stated by him are corroborated by Wiedman, while the *opinion* of the latter does not cleanse the facts of their real color. We are compelled to conclude that Mr. Dickens was "playing a sharp game," as he expressed it, in earnest; and that he was engaged in the unwarrantable and highly censurable attempt to make his opponent drunk in order to take an advantage of him. This was a wicked act, as well as one which struck directly at the due administration of justice. In its effect and criminal purpose it differs none from tampering with a juror, corrupting a witness or bribing a judge. It strikes directly at the interests of the opposite party, with as great force as if he lost his cause from the misconduct of juror, witness or judge. The man who can do this thing is unfit to practice in a court where justice is administered, and should be expelled from its bar; or at least should be suspended from the practice until he has shown, by sincere amendment, that his offense is thoroughly purged. The office of an attorney-at-law is a highly honorable one, as well as one of great importance to society. The necessities of men, in a state of high civilization, require the profes-

Dickens' Case.

sion of the law as a distinct calling; one to be exercised by men trained to it by a long course of study, and qualified by skill and learning to understand, protect and assert the rights of others, who, by reason of the state of society, or their own inability, cannot act for themselves. As property increases and new forms of it are developed, new institutions are created for its management; and as the business of society multiplies, interweaves and expands, and wealth and luxury follow in the train of commerce and the arts, the relations of men become more and more complicated and render the profession of the lawyer indispensable and important. Integrity, as well as skill and learning, is essential to the character of the profession, and it becomes the duty of the bench, as well as of the bar itself, to preserve that character in its highest state, as a means of usefulness, and of answering the true end of a profession so honorable and at the same time so needful. Notwithstanding the prejudices of some, the ignorance of others, and even the discredit occasionally brought upon the office by unworthy members, we are glad to know that the bar is filled with many worthy men, and that a trust and confidence almost unlimited is justly reposed in it by the public. In the present case the three judges of the court below agreed in opinion in finding the third specification to be true, and in this we find no error. We are compelled, therefore, to affirm the order of the court under that specification, leaving the appellant to make his application to the judges of that court for readmission, should they think his offense sufficiently atoned for by six years' exclusion from the practice of his profession in the courts from which he was expelled, and that he has retrieved his character by good conduct so as to warrant his return to practice there.

Order affirmed upon the third specification of the complaint, with costs.

COLTON, appellant, v. CLEVELAND AND PITTSBURG R. R. Co.

(67 Penn. St. 211.)

Common carriers—special contract—burden of proof—negligence.

A bill of lading given by a railroad company on receipt of goods for transportation contained the following clause: "The dangers incident to railroad transportation, fire, and all other unavoidable accidents excepted." The goods were destroyed by fire, and in an action against the company to recover their value, *held*, (1), that the exception of loss by "fire" was a limitation upon the common-law responsibility of the company; (2), that the exception was of "fire," whether *unavoidable* or not, provided it was not by the negligence of the company; and (3), that the burden of proof of negligence was upon the plaintiff, the common-law liability being thus changed.

ACTION in assumpsit by Colton against the Cleveland and Pittsburg Railroad Company. The plaintiff in June, 1866, delivered 100 barrels of flour to the defendant company at Lima, to be transported to Pittsburg, and received a bill of lading from the company's agent containing the following proviso: "the damages incidental to railroad transportation, fire, and all other unavoidable accidents excepted." The warehouse of defendant, in which the flour was stored, immediately on receipt of it, was destroyed by fire on the following night. This action was brought by plaintiff to recover for the loss of the flour. The evidence introduced by defendant was to the effect that the fire when discovered had made such headway that nothing could be done to save the building; that after the flour was received no freight train had passed so that the flour could be sent, and that the engines of the company, especially those which passed Lima on the night of the fire, were provided with the best spark-arresters in use, or known to railroad men.

The following points and answers are inserted for a better understanding of the case. Plaintiff's points:

"4. The exception in the contract in this case is against unavoidable fire, and the defendant, therefore, cannot be excused without showing that the fire, of which evidence has been given, happened from a cause which no human skill or foresight could have guarded against. Refused.

"5. The presumption of law is, that the fire happened through the negligence of the defendant, and this presumption can only be

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Colton v. Cleveland and Pittsburg Railroad Company.

rebutted by direct evidence on their part, showing that the fire happened without any fault whatever on their part, despite the exercise by them of the highest degree of skill and foresight." Refused.

"7. If the jury believe the fire to have been occasioned by sparks thrown from the defendant's locomotives passing the depot, such fact is evidence of negligence on the part of the defendant, and plaintiff is entitled to recover."

Answer. "This point is refused, unless the jury find also that the sparks were thrown by reason of careless or negligent management of the locomotives, or their defective construction. If the defendant exercised ordinary care and skill in providing good and safe spark-arresters, approved by skillful and experienced mechanics, and the locomotives thus provided were carefully and skillfully operated at the time and place in question, the defendant would not be liable, even if the jury should be of the opinion that the fire was occasioned by sparks from defendant's locomotives passing the depot. On the other hand, if you find that the sparks were thrown and the building fired in consequence either of the defective construction or careless management of the locomotives, the defendant would be liable.

"9. The neglect of the defendant to employ a watchman, or to provide water or other means of extinguishing a fire, is negligence *per se*, and a loss having happened, the plaintiff is entitled to recover. Refused.

"10. In order to relieve the defendant from liability in this case, he ought to have shown that diligent efforts were made to rescue the property of the plaintiff and other shippers from the flames, and to check the fire." Refused.

"12. If the jury are unsatisfied by the evidence as to the cause of the fire, the presumption of law remains that the fire happened through defendant's negligence." Refused.

Defendant's points:

"1. The exceptions contained in the plaintiff's bill of lading, or receipt of defendant for said flour, limited and restricted the liability of the defendant as carrier to that of a private carrier, or of an ordinary bailee for hire, and that the defendant is answerable only under said bill of lading or receipt for want of ordinary care and skill." Affirmed.

Colton v. Cleveland and Pittsburg Railroad Company.

"3. The burden of proof of negligence is, under this contract, upon the plaintiff." Affirmed.

Verdict for the defendant. The plaintiff appealed.

J. S. Ferguson, for appellant, cited *Beach v. Parmeter*, 11 Harria, 197; *Morrison v. Davis*, 8 id. 171; Story on Bailments, 487, 489; *Walpole v. Bridges*, 5 Black. 222; *Beckman v. Shouse*, 5 Rawle, 189; *Graff v. Bloomer*, 9 Barr, 114.

S. Schoyer, for appellee, cited *Farnham v. Camden and Amboy Railroad*, 5 P. F. Smith, 55; *Graff v. Bloomer*, *supra*; *Atwood v. Reliance Transp. Co.*, 4 Watts, 87; Angell on Carriers, §§ 220, 225, 276.

THOMPSON, C. J. We think the learned judge below was entirely right in constructing the exception in the bill of lading in this case as restrictive of the law of liability of common carriers. It is as follows: "The dangers incident to railroad transportation, fire, and all other unavoidable accidents excepted." Without doubt, the exception of loss by "fire" was a limitation upon the common-law responsibility, and brings the case within the case of *Farnham v. The Camden and Amboy Railroad Company*, 5 P. F. Smith, 55. The learned judge refused to hold, as the plaintiff below insisted upon, that the word "unavoidable" qualified the word "fire" in the exception. This was right. To have held otherwise would have been to regard the enumeration of the peril as utterly inefficient and useless, as the words, "other unavoidable accidents," would cover it. The exception in this bill was of "fire," whether unavoidable or not, provided it was not by the negligence of the company, which cannot be provided against. The common-law liability being thus changed, the *onus* of proof of where the fault lay was changed, as is shown in *Farnham v. The Camden and Amboy Railroad Co.*, *supra*. The case was well decided below, and as we see no error in the record, the judgment must be affirmed.

Judgment affirmed.

NOTE.—See *Grace v. Adams*, 1 Am. Rep. 181 and note; *Christensen v. American Express Co.*, 3 id. 123; *Steinweg v. Erie Railway*, 3 id. 672.—RMR.

NEGLEY *et al.*, appellants, v. LINDSAY.

(97 Penn. St. 317.)

Evidence. Deed. Ratification of fraudulent contract. Burden of proof.

In an action for the purchase-money under articles of agreement for the sale of land, a deed containing a description like that in the articles is *prima facie* certain enough, and should not be excluded from evidence on the ground of *insufficiency* in the description. The question of such insufficiency is for consideration, subsequent to the admission in evidence.

A contract tainted with fraud may be ratified without a new contract, founded on a new consideration.

In an action for the purchase-money under an agreement for the sale of land by which the plaintiff bound himself to give possession and execute a warranty deed upon the payment of the purchase-money, the declaration alleged that plaintiff had at all times been ready and willing to perform his part of the agreement; but the defendant pleaded that the plaintiff was not seized of the land agreed to be conveyed. *Held*, that under the issue thus raised plaintiff was called upon to prove his title.

ACTION of debt by Lindsay against Negley *et al.* The declaration set forth an agreement for the purchase of land by defendant from plaintiff, for the sum of \$10,000, the plaintiff binding himself by the agreement to deliver possession and a warranty deed upon the payment of the said purchase money. The declaration averred that the plaintiff had been at all times ready and willing to perform his part of the agreement. The defendants averred fraud and misrepresentation; they pleaded "*non est factum*," and filed a special plea to the effect that plaintiff was not at the time of the agreement, and is not now seized of the premises agreed to be conveyed. Evidence was introduced of the articles of agreement, and of a deed tendered by plaintiff and refused. The offers of evidence, the rulings of the court and the points made by the defence as to the validity of the agreement are set forth *seriatim* in the opinion of the court. Judgment for plaintiff. Defendants appeal.

A. M. Brown and *T. M. Marshall*, for appellant, cited *Soles v. Hickman*, 8 Harris, 180; *Hammer v. McElidowney*, 10 Wright, 334; *Martin v. Duffey*, 4 Phila. 75; *Hagey v. Detweiler*, 11 Casey, 409; *O'Keson v. Silverthorn*, 7 W. & S. 246; *Smith v. Webster*, 2 Watts, 478; *Adams v. Williams*, 2 W. & S. 227; *Espy v. Anderson*, 2

Negley v. Lindsay.

Harris, 308; *Martin v. Hammon*, 8 Barr, 270; Rawle on Covenants for Title, 430, 431, and note 2; *Dalzell v. Crawford*, 1 Parsons' Reports, 45; *Duncan v. McCullough*, 4 S. & R. 482.

M. W. Acheson, for appelle, cited *Watts v. Cummins*, 9 P. F. Smith, 84; *Richardson v. Stewart*, 2 S. & R. 84; *Banks v. Ammon*, 3 Casey, 172; *Simpson v. Breckenridge*, 8 id. 287; *Siegel v. Robinson*, 6 P. F. Smith, 19; 2 Hilliard on Vendors, 17; *Snevily v. Egle*, W. & S. 484; *Hite v. Kier*, 2 Wright, 72; 2 Parsons on Contracts, 276-279; *Kingsley v. Wallis*, 2 Shepley, 57; 1 Sugden on Vendors, 277; *Pearson v. Chapin*, 8 Wright, 9.

SHARSWOOD, J. The first assignment of error is to the admission in evidence of the deed of Lindsay and wife to the defendant, dated March 3, 1866, and the seventh and eighth errors to its effect when admitted. The objection was to the insufficiency of the description of the premises conveyed. "All that certain tract or parcel of land situate in Wood county, West Virginia, located on Little Stillwell creek, between three and four miles from the Baltimore and Ohio railroad, on the National turnpike." The abutters on the west and north are then given, but those on the east and south are left in blank; and it then adds, "and contains 180 acres, more or less, and now occupied by Jacob Buzzard as tenant." *Prima facie* such a description was certain enough, and there was no error, therefore, in the admission of the deed. It followed the description as contained in the article. It might have been competent to the defendant to have shown by parol evidence that it was insufficient to identify the tract, but that would be a question subsequent to its admission. *Richardson v. Stewart*, 2 S. & R. 84. No such evidence was given. The second assignment is in overruling the defendant's motion for judgment of nonsuit. But it is perfectly well settled, that a refusal to direct a nonsuit to be entered is not the subject of review on a writ of error. *Girard v. Gettig*, 2 Binn. 234; *Bavington v. Pittsburg and Steubenville Railroad Co.*, 10 Casey, 358; *The United States Telegraph Co. v. Wenger*, 5 P. F. Smith, 262.

The third error assigned is to the admission of a part of the evidence of Jacob Buzzard, in which he was allowed to testify that he had received an offer for the purchase of the land in controversy, at the price of \$14,000, from a responsible party, who purchased

Negley v. Lindsay.

other land in the vicinity. This evidence was certainly inadmissible. If it showed the opinion of the person who made the offer, it was mere hearsay.

If the value of the land or other thing could be proved in this way, nothing would be easier than to manufacture abundance of such testimony.

The fourth, fifth, sixth, tenth, eleventh and twelfth assignments may be considered together. They are in answer to points, and to the charge of the learned judge below, all involving substantially the same question. One defense set up was that the plaintiff had been guilty of fraudulent misrepresentations as to the character and value of the land which was the subject-matter of the contract of sale. There was evidence that Gen. Negley, one of the defendants, after the contract had been made and signed, as agent, and on behalf of the others, had visited and examined the property. The learned judge held, and so instructed the jury, that if they found this to be so, and that Gen. Negley became acquainted, or had the opportunity of becoming acquainted with the true state of the facts, the defendants were bound to give notice to the plaintiff, within a reasonable time, of their rescission of the contract, and if they waited until after they had attempted and failed to get up an oil company to take the land, they could not avail themselves of this defense. It was decided, indeed, in *Duncan v. McCullough*, 4 S. & R. 487, that when a contract is in itself fraudulent, it is void, and cannot be confirmed by any subsequent declarations or acts by which its fairness is acknowledged. "Where there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation; what was once a fraud will always be so. The reason of the distinction is, that a contract infected with that kind of fraud, which must be proved and not presumed from the circumstances of the parties, is not merely voidable but void; and confirmation without a new consideration would be *nudum pactum*." Per GIBSON, J. This decision has been recognized and affirmed in *Chamberlain v. McClurg*, 8 W. & S. 31; *Goepp's Appeal*, 3 Harris, 428; *Miller's Appeal*, 6 Casey, 478. Yet there are some cases not easily reconciled with this broad doctrine, as in *Juniata Bank v. Brown*, 5 S. & R. 234, where Chief Justice TILGHMAN said: "To make a confirmation of a contract, in which a man has been defrauded, very strong facts must be shown; and, particularly, it must appear that those acts were done with full knowledge

of the truth." In *Staines v. Shore*, 4 Harris, 200, which was a case of fraud in the sale of a horse by auction, by the employment of a puffer, Chief Justice GIBSON said: "Had the horse lived, in this case, it would have been necessary to return or tender him to the vendor, as soon as the fraud was discovered;" implying that if he was kept on hand and used by the vendee—much more, if he had tried to sell him at a greater price than he had given for him, and only on finding that he could not, offered to return him—the defense of fraud would not avail him. Judge BALDWIN, who may be regarded as belonging to our own judiciary, in *Blydenburg v. Welsh*, Baldw. 338, held, that if, after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it, on a condition which he has no right to exact, he thereby waives the fraud and cannot set it up in an action on the contract. "This," said, he, "is a waiver of the objection to the contract on the ground of fraud, if he was informed of all matters which bore upon that question; if he remained ignorant of them, it is no waiver." The authorities cited by Mr. Justice GIBSON, in *Duncan v. McCullough*, of *Ardglass v. Munbaugh*, 1 Vern. 237, and *Wiseman v. Beake*, 2 Vern. 121, are those of young heirs dealing with their expectancies, "catching bargains," where the contract has been held void on the ground of public policy, and, as is remarked by Mr. Justice STORY (1 Eq. Jur. § 337), "the aim of the rule is chiefly directed to prevent deceit and imposition upon parents, and other creditors." Of these cases, Lord HARDWICKE remarks, the same fraud attended the confirmation, as the original bargain. *Baugh v. Price*, 1 Wilson, 320, was a case of the same kind, and it is there expressly put on the ground that the contract was void, as against public policy. *Brooks v. Gally*, 2 Atk. 34, which he also cites, can hardly be said to support him; for it was a claim for wines and liquors furnished to a school-boy, and a note given by him for the amount, a few days after he came of age.

Of course, where a contract is void on the ground of public policy, or against a statute, as the usury law, there is every reason to hold the confirmation affected with the original taint. *Shelton v. Marshall*, 16 Texas, 344. Certain it is that the doctrine, that a contract void on account of fraud practiced on the party is incapable of confirmation, is not the generally received doctrine of the elementary writers. 1 Story's Eq. Jur. 345; Addison on Contracts, 273; 1 Sugden on Vendors, 276; 2 Parsons on Contracts, 780. But, however

Negley v. Lindsay.

this may be, we must now consider *Duncan v. McCullough*, as overruled by *Pearson v. Chapin*, 8 Wright, 9, in which it was expressly decided that a contract tainted with fraud may be confirmed or ratified without a new contract founded on a new consideration. It is there said, that he who knowingly accepts and retains any benefit under such a contract, or who uses the property acquired as his own, after the discovery of the fraud, or who does any positive act forgiving the fraud, or unduly delays claiming back his property, or giving up what he received, affirms the validity of the contract; and decisions in the courts of our sister States are cited in support of these instances. To which may be added *James v. Emery*, 40 N. H. 348; *Mason v. Bovet*, 1 Denio, 69; *The Mattiwan Co. v. Bentley*, 13 Barb. 641; *Wheaton v. Baker*, 14 id. 594.

"Ratification," says Chief Justice LOWRIE, "is, in general, the adoption of a previously formed contract, notwithstanding a view that rendered it relatively void; and by the very nature of the act of ratification, confirmation, or affirmance (all these terms are in use to express the same thing), the party confirming becomes a party to the contract, he that was not bound becomes bound by it, and entitled to all the proper benefits of it; he accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification. A mere ratification cannot, of course, correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration, or for any other defect, a mere ratification can add nothing to its binding force." These principles are only a recurrence to those advanced by Lord Chancellor HARDWICKE, in *Chesterfield v. Janssen*, 2 Ves. 125, 1 Atk. 354, the result of which was, that if the original contract be illegal or usurious, no subsequent agreement or confirmation of the party can give it validity. But if it be merely against conscience, then, if the party, being fully informed of all the circumstances of it, and of the objections to it, in his own words "with his eyes open," voluntarily confirms it, he thereby bars himself of that relief which he might otherwise have had in equity. 1 Fonblanque's Eq., b. 1, ch. 2, s. 13 n. Upon the principles thus established, we discover no error in the rulings of the learned judge below upon this subject.

The ninth assignment of error remains to be examined. It presents the question, whether, under the pleadings, it was incum-

bent on the plaintiff to prove that he had a clear, indisputable title in fee simple to the land which he contracted to sell the defendants. The form of action was debt, and not covenant, as is more usual in such cases; but it can make no difference what is the form of action. The declaration alleged that the plaintiff had on his part duly kept and observed the agreement, and hath at all times been ready and willing to do and perform all things required of him in and by said agreement. Besides the general pleas of *non est factum* and *never indebted*, the defendants pleaded, amongst other special pleas, that the plaintiff was not, at the date of the said agreement, and is not, seized of the said tract of land in the said declaration and agreement mentioned. This was not a plea in confession and avoidance, but a traverse of the averment in the declaration of the plaintiff's performance and readiness to perform. This meets and satisfies those cases which appear to hold it to be necessary, at least in an action of covenant, in which there is strictly no general issue, that the plaintiff by the pleading should have notice that he would be called on to prove his title. *Snevily v. Egle*, 1 W. & S. 484; *Martin v. Hammon*, 8 Barr, 270; *Espy v. Anderson*, 2 Harris, 308; *Hite v. Kier*, 2 Wright, 72.

I do not propose therefore to discuss this case, nor to inquire whether, under the general issue of *nil debit*, or never indebted, in this action, it was incumbent on the plaintiff to meet this proof. That, under such a traverse as was put in here, it was so, is abundantly clear. In *Dearth v. Williamson*, 2 S. & R. 498, which was a covenant to make a lawful deed of conveyance, Chief Justice TILGHMAN said, "The plaintiff was to make a lawful deed of conveyance, for which he was to receive the full value of the land. It does not appear that the plaintiff had any title whatever." In *Heron v. Hoffner*, 3 Rawle, 400, Mr. Justice KENNEDY says: "I apprehend that the vendor, when he proceeds to recover the purchase-money, ought at least to show that he had it in his power to make a good title, because he will be bound to make it upon payment of the purchase-money. It would be gross injustice were it otherwise." Again, in *Smith v. Webster*, 2 Watts, the same learned judge said, "This action being carried on for compelling payment of the purchase-money, they (the plaintiffs) ought to have shown that they had it in their power to make an indefeasible title in fee for the land." How can a defendant show defects in the plaintiff's title unless it is produced to him? It is not enough to say that he

 Alter's Appeal.

may resort to the records. He must have some clue to trace it there. Beside, there are many necessary facts as to which the records will give him no information, such as descents under the intestate laws, the death of tenants for life, and others of a similar kind. It may not be necessary for him to produce his deeds or furnish an abstract of his title before commencing his action, but surely the *onus* is upon him to prove his right to the purchase-money, which it is clear that he has not unless he can convey a perfectly good title, or the vendee has specially agreed to accept only such title as he has. If this is not so, the vendee may be compelled to pay for moonshine; and this, as Mr. Justice KENNEDY says, would be gross injustice.

We think, therefore, that the learned judge below committed an error in his answer to the defendant's third point; and that the plaintiff, having failed to show any title to the land which he had contracted to convey, was not entitled to recover.

Judgment reversed, and a venire facias de novo awarded.

 ALTER'S APPEAL.

(67 Penn. St. 341.)

Constitutional law. Mutual wills. Mistake. Reformation of wills.

A husband and wife each had a will drawn in favor of the other. After the husband's death it was found that each, by mistake, had signed the will of the other, to remedy which error the legislature passed a special act authorizing the court to reform the will in case the mistake was proved. *Held*, that there was, in law, no will; that, at the death of the husband, his estate vested in his heirs; and that the subsequent legislation was invalid, the effect of it being to divest estates.

APPEAL from a decree refusing to admit to probate, as the will of George A. Alter, an instrument in writing, signed "Catharine Alter," said Catharine being sole legatee, devisee and executrix in the will and the appellant in this case. The opinion states the case.

A. V. Parsons and *W. L. Hirst*, for appellant, cited *Arndt v. Arndt*, 1 S. & R. 256; *Matthews v. Warner*, 4 Vesey, 186; *Griffin*

Alter's Appeal.

v. *Griffin*, 1 Burr. 549; *Walmesley v. Read*, 1 Yeates, 87; *Story's Eq. Jur.*, §§ 79, 80, 110; *Willan v. Willan*, 16 Vesey, 72; *Lansdown v. Lansdown*, 2 Jacob & Walker, 205; *Milner v. Milner*, 1 Vesey, Sr. 106; *Phillips v. Chamberlaine*, 4 Vesey, 51; *Parsons v. Parsons*, 1 Vesey, Jr. 266; *Beaumont v. Fell*, 2 P. Wms. 141; *Baylis v. Attorney-General*, 2 Atkins, 239; *Stockdale v. Bushly*, 19 Vesey, 381; *Rankin v. Mortimere*, 7 Watts, 372; *Jenks v. Fritz*, 7 W. & S. 201; *Heacock v. Fly*, 2 Harris, 540; *Gross v. Leber*, 11 Wright, 520; *Danvers v. Manning*, 2 Brown's C. C. 18; *Stebbing v. Walkey*, id. 86; *River's Case*, 1 Atkins, 410; *Fonnereau v. Poyntz*, 1 Brown's C. C. 412; *Powell v. Biddle*, 2 Dall. 70; 1 Redfield on Wills, 348, 349; *Lewis v. Lewis*, 6 S. & R. 497; 1 Jarman on Wills, 231; *Armstrong v. Armstrong*, 29 Alabama Rep. 528; *Day v. Day*, 2 Green Chan. Rep. 330.

T. Mitchell (with whom was *F. Heyer*), for appellees, cited Wills Act, April 8, 1833, § 6; Pamph. L. 249, Purd. 1016, pl. 6. Also, Adams on Eq. 172; 3 Black. Com. 431; *Whitton v. Russell*, 1 Atk. 448; 1 *Story's Eq. Jur.*, § 106, and cases cited; Comyn's Dig., tit. Chancery, 3 F. 6, 7, 8; Redf. on Wills, ch. 7, 206 and notes; *Greenough v. Greenough*, 1 Jones, 489; *Shinkle v. Crock*, 5 Harris, 162; *McCarty v. Hoffman*, 11 id. 507; *Aurand v. Wilt*, 9 Barr, 54; Redfield on Wills, ch. 10; Stark. on Ev. 762-4; *Mann v. Mann*, 1 Johns. Ch. 231; *Wallize v. Wallize*, 5 P. F. Smith, 242; *In re Davy*, 1 Swabey & Tris. 261; *Hiscocks v. Hiscocks*, 5 Mee. & W. 364; *Tucker v. Seamen's Aid Soc.*, 7 Met. 188; *Dent v. Pepys*, 6 Madd. Ch. R. 350; *Kelley v. Kelley*, 1 Casey, 460; Stark. on Ev. 765; 1 Redf. on Wills, ch. 7, § 18, pl. 4; *Norman v. Heist*, 5 W. & S. 173. Adams Eq. 175, 248, 249; 1 *Story's Eq. Jur.*, § 184 and note; 2 id., §§ 1445, 1446; *Allan v. McPherson*, 1 H. of Lds. Cases, 191; 1 Spence's Eq. Jur. 701.

AGNEW, J. This is a hard case, but it seems to be without a remedy. An aged couple, husband and wife, having no lineal descendants, and each owning property, determined to make their wills in favor of each other, so that the survivor should have all they possessed. Their wills were drawn precisely alike, *mutatis mutandis*, and laid down on a table for execution. Each signed a paper, which was duly witnessed by three subscribing witnesses, and the papers were inclosed in separate envelopes, indorsed and

Alter's Appeal.

sealed up. After the death of George A. Alter, the envelopes were opened and it was found that each had by mistake signed the will of the other. To remedy this error the legislature, by an act approved the 23d day of February, 1870, conferred authority upon the register's court of this county to take proof of the mistake, and proceed as a court of chancery to reform the will of George A. Alter and decree accordingly. Proceedings were had, resulting in a decision of the register's court that there was no will, and that the act to reform it was invalid, the estate having passed to and vested in the collateral line of kindred. From this decree an appeal has been taken by Catharine Alter.

On this statement the first inquiry is, was the paper signed by George A. Alter, his will? Was it capable of being reformed by the register's court? The paper drawn up for his will was not a will in law, for it was not "signed by him at the end thereof," as the wills act requires. The paper he signed was not his will, for it was drawn up for the will of his wife and gave the property to himself. It was insensible and absurd. It is clear, therefore, that he had executed no will, and there was nothing to be reformed. There was a mistake, it is true, but that mistake was the same as if he had signed a blank sheet of paper. He had written his name, but not to his will. He had never signed his will, and the signature, where it was, was the same as if he had not written it at all. He therefore died intestate, and his property descended as at law. The difficulty lies not in the want of power of a court of chancery to reform a mistake in an existing will, when full equity power to that end is conferred by the law, but in the want of power to give an existence to that which had none before. And the objection to the validity of the act conferring the authority to decree the will, lies not in a want of power in the legislature to establish a will upon parol proof of the fact of making it, and of the intent to execute the proper paper, but in its want of power to divest estates already vested at law on the death of George A. Alter without a will. There being no will, it is evident that the effect of any subsequent legislation, call it by what name we may, is simply to divest estates. That this cannot be done is abundantly proved by *Greenough v. Greenough*, 1 Jones, 494; *McCarty v. Hoffman*, 11 Harris, 508; *Norman v. Heist*, 5 W. & S. 171; *Bolton v. Johns*, 5 Barr, 145; *Dale v. Metcalf*, 9 id. 108, and other cases. The first two cases are directly in point, for it was held therein that the act

 Ferree v. Oxford Fire and Life Insurance Company.

of assembly, validating wills where the testator had made his mark instead of signing his name or expressly directing it to be signed for him, could not reach the case of a will so executed, where the testator had died before the passing of the act.

The decree of the register's court is, therefore, affirmed, with costs to be paid by the appellant.

Decree affirmed.

 FERREE, appellant, v. OXFORD FIRE AND LIFE INSURANCE CO.

(97 Penn. St. 372.)

Fire insurance—assignment of policy.

A policy of fire insurance contained the following condition: "Policies of insurance, subscribed by this company, shall not be assignable without the consent of the company expressed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease." The policy was assigned, without consent of the company, as collateral security for a debt. A loss by fire occurred, and the insured redeemed the policy. *Held*, that he could not recover thereon. THOMPSON, Ch. J., dissented.

ACTION on a policy of fire insurance. The opinion states the case. Judgment below for defendants. Appeal by Ferree, the plaintiff.

R. T. Cornwell (with whom were *W. Darlington* and *R. E. Monaghan*), for appellant, cited *Peabody v. The Ins. Co.*, 30 Barb. 339; *Hill v. Ins. Co.*, 9 P. F. Smith, 474; *Ins. Co. v. Stewart*, 7 Harris, 45; *Masters v. Ins. Co.*, 11 Barb. 624; 2 Parsons on Contracts, 451; *Ins. Co. v. Roberts*, 7 Casey, 438; *Ins. Co. v. Berger*, 6 Wright, 291; *Finley v. Ins. Co.*, 6 Casey, 311; *The Ins. Co. v. Berger*, *supra*; *Buckley v. Garrett*, 11 Wright, 204; *The Ins. Co. v. Cropper*, 8 Casey, 351; Angell on Insurance, 247; *Carpenter v. The Washington Ins. Co.*, 16 Peters, 495; 2 Parsons on Contracts, 354, 355; *Lazarus v. Ins. Co.*, 19 Pick. 81; 4 Kent's Com. 131; *Goit v. The Ins. Co.*, 25 Barb. 189; *Courtney v. The Ins. Co.*, 28 id. 116; *The Ins. Co. v. Helfenstine*, 4 Wright, 289.

G. F. Smith (with whom were *W. B. Waddell* and *P. F. Smith*), for appellee, cited *Grevemeyer v. Southern Ins. Co.*, 12 P. F. Smith.

Ferree v. Oxford Fire and Life Insurance Company.

340; *Hill v. Cumberland Valley Mut. P. Co.*, 9 id. 474; S. P., 3 Kent's Com. 375; *Smith v. Saratoga M. F. Ins. Co.*, 1 Hill, 497.

READ, J. On the 14th of January, 1869, the defendants issued to the plaintiff a policy of insurance, for \$4,000, on certain premises against fire for one year from that date, who assigned the same to Amos K. Hanna and Eber Anderson, as collateral security for money loaned him, and on the 23d of August, 1869, the said Eber Anderson assigned the same to L. A. W. Pyle, to whom he had assigned the judgment which he held. Neither of these assignments were submitted to or approved by the defendants. On the 20th of January, 1870, the plaintiff paid to the defendants \$8.33, the annual payment for the continuance of the said insurance for one year, and on the 18th of February the building was totally destroyed by fire, since which he has paid the debts to secure which the policy was assigned.

The defense is, that by the third condition annexed to the policy the liability of the defendants ceased by reason of the above assignments, which were made without the consent of the company expressed thereon. In this case no consent was given to either of the assignments, nor was there any waiver of the condition in any manner or form by the defendants. "Policies of insurance," says the condition, "subscribed by this company, shall not be assignable without the consent of the company expressed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease." This condition is a perfectly legal one. *Smith v. Saratoga County Mut. Fire Ins. Co.*, 1 Hill, 497; *Same v. Same*, 3 id. 508; 1 Phillips on Insurance, 477; Angell on Fire and Life Insurance, 249, 251. The remaining part of the third condition has no bearing on the present case, having no application when the liability of the company has entirely ceased.

We have examined the authorities cited by the plaintiffs and find nothing affecting in any way this condition or its plain and obvious meaning.

Judgment affirmed.

THOMPSON, C. J., dissented.

SLACK, appellant, v. KIRK.

(67 Penn. St. 280.)

Promissory note — rights of indorsers.

A second indorser of a promissory note, who, by mistake or inadvertence, writes his name above the first indorser, and is called upon to pay a portion of the note, may recover the amount so paid from the first indorser.

ACTION in assumpsit by Kirk against Slack. It appears that a promissory note of \$1,000 was drawn by T. & J. P. Scott, for their own accommodation, to the order of Slack, who indorsed it. Kirk was also procured as indorser by the Messrs. Scott; but he unintentionally wrote his name above that of Slack. The note was discounted by the National Bank of Oxford, for the benefit of the drawers, who paid a portion of the note, but failed to pay the balance. The bank then collected one-half of the balance from Slack and the other half from Kirk, who paid voluntarily, but at the same time asserted that Slack was liable to him. This action was brought to recover the amount so paid. Judgment was entered for plaintiff; whereupon defendant appealed.

R. T. Cornwell and *W. Darlington*, for appellant, cited *Schaffer v. Farmers' & Mechanics' Bank* of Easton, 9 P. F. Smith, 144; *Murray v. McKee*, 10 P. F. Smith, 35; Act of April 26, 1855, § 1, Pamph. L. 308; Purd. 497, pl. 4; *Herrick v. Carman*, 12 Johnson, 180.

J. J. Lewis, for appellee, cited Act of 1855; *Barto v. Schmeck*, 4 Casey, 451; Brown on Frauds, § 406; *Leonard v. Vredenburg*, 8 John. 29; *Union Bank v. Coster's Exrs.* 3 Comstock, 210; *Bailey v. Freeman*. 11 John. 221; *De Wolf v. Raband*, 1 Peters, 498; *Moies v. Bird*, 11 Mass. 436; *Nelson v. Dubois*, 13 John. 476; *Campbell v. Butler*, 14 id. 349; *Sampson v. Thompson*, 3 Metc. 278; *Schafer v. Farmers' & Mechanics' Bank*, 9 P. F. Smith, 150; *Harbold v. Kuster*, 8 Wright, 392; *Fisher v. Deibert*, 4 P. F. Smith, 463; *Shenk v. Robeson*, 2 Grant, 272; *Schafer v. Farmers' & Mechanics' Bank*, *supra*; Story on Prom. Notes, p. 145; Chitty on Bills, 147; *Folger v. Chase*, 18 Pick. 63.

AGNEW, J. As between the parties to the action, this case does

Slack v. Kirk.

not fall within the statute of frauds of 26th April, 1855, requiring a writing to be signed by the party to be charged in order to make him answerable for the debt or default of another. The note upon which this question arises was drawn by T. and J. P. Scott, to the order of Timothy Slack, and indorsed by James S. Kirk, first in the order of position on the back of the note, and next by Slack, the payee. The note was discounted by the National Bank of Oxford for the benefit of the drawers, who afterward failed to pay, except a part. The bank then collected one-half of the balance from Slack and the other half from Kirk, who paid voluntarily, but asserting at the same time Slack's liability to him. Then granting that, by reason of Kirk's irregular indorsement before Slack, the payee, neither Slack nor the bank could compel payment by Kirk, according to the decisions in *Barto v. Schmeck*, 4 Casey, 477, *Schaffer v. The Bank*, 9 P. F. Smith, 144, and *Jack v. Morrison*, 12 Wright, 118, yet Slack, the payee and indorser of the note, was undoubtedly liable to the bank. He could set up neither the statute of frauds nor Kirk's want of liability, being the payee and regular indorser of the note as to the bank. He could not object, therefore, to payment to any transferee of the bank, or to any one rightfully paying the note, and entitled to substitution to the rights of the bank. Kirk, as irregular indorser, was the only party having a right to set up the statute of frauds, for his was the only parol agreement. But if, as an irregular indorser, liable only upon his verbal promise to be answerable to the bank for the payment of the note, he chose to comply with his agreement, who can object? Certainly not Slack, for the payment enured to his benefit, if Kirk was liable to him; and if not, it was a matter of indifference to him whether he should pay the bank or some one else who became entitled to the note. The statute was made for the protection of a party alleged to have made a verbal assumption, to be answerable for the debt or default of another; but if he admits his promise, and does not ask the shield of the statute, it does not compel him to be dishonest. Clearly Kirk had a right to pay if he would; and paying, he is entitled in equity to be subrogated to the rights of the bank, unless Slack can show that Kirk had also agreed to be liable to him for payment by the drawers. This promise, though not enforceable *against* Kirk, by reason of the statute, probably would be a defense to Slack. What right, then, has Slack to object to Kirk fulfilling any promise he had made to the bank to be answerable for payment of the note? Clearly he

had none by reason of the face of the paper, Kirk being an irregular indorser and not liable to him, according to the cases before cited. There was a moral obligation on the part of Kirk to perform his promise to pay the bank, and this, followed by actual payment, constitutes his equity, and entitles him to substitution. If Slack claims protection against Kirk by reason of a promise to indemnify him, he must make proof of it; otherwise, why should he have any defense to Kirk, standing in the room of the bank? If it be objected that the irregular indorsement^a by Kirk will not in itself enable him to maintain the suit, it might be answered by saying that the action is amendable, and the name of the bank can be used for his benefit. But what is to hinder Kirk's action? On paying the note to the bank, he is entitled to delivery of it, and can claim as a holder under Slack's blank indorsement. His own name being irregularly indorsed before Slack, can of itself make no difference, for he is not liable to Slack upon that indorsement, according to *Barto v. Schmeck* and *Schaffer v. The Bank*, the presumption being that he was intended to be the second indorser, and it was Slack's own wrong to indorse below him. To escape this, Slack must resort to proof. But if we resort to the parol evidence in this case the same result follows. It shows that Kirk never did assume the position of first indorser intentionally, and that his name was written above Slack's by inadvertence or mistake. The note was brought to him by the drawer, with Slack's indorsement already on it, and without an intimation that he should assume the position of first indorser. He went to the bank with the drawer to assist him in having it discounted and without having indorsed it; and it was only when the bank refused the discount without his name that he indorsed the name. The order of his indorsement, it is evident, was unnoticed, or its effect unknown, as it tended rather to jeopard the security of the bank than to increase it. As the case stood, therefore, this evidence did not alter the relation of Slack to the bank, who had regularly indorsed the note as the payee, nor did it give him any recourse against Kirk. In either aspect, therefore, the plaintiff was entitled to recover the money paid by him to the bank, the payment not being voluntary in the sense of a payment by a mere volunteer, but being made on the footing of a promise to pay and an indorsement of the note. Having waived the protection of the statute, and honestly paid the

Schuylkill County v. Copley.

bank according to his undertaking, he has a right to use the name of the bank, or to sue in his own name to recover the money.

Judgment affirmed.

SCHUYLKILL COUNTY, appellant, v. COPLEY.

(67 Penn. St. 386.)

Bond — fraudulent inception. Witness.

An illiterate man signed a paper, which was falsely represented to be a petition but which was really a bond. *Held*, that he was not liable thereon, the plea of *non est factum* being good, although the obligee was not aware of the fraud before accepting the bond.

Embezzlement of county funds, by a tax collector, is not an infamous crime, although punished as such, and does not exclude the offender as a witness even while undergoing sentence.

FEIGNED ISSUE between Copley, as plaintiff, and the county of Schuylkill, as defendant, to try the question whether a certain instrument, on which judgment had been entered under a warrant of attorney, was the bond of plaintiff, as surety of one Thomas Fogarty, a collector of taxes. On the trial, it was proved that Fogarty obtained the signature of Copley, who was an illiterate man, by representing to him that the paper was a petition to the county commissioners for his appointment as tax collector. Defendant offered as a witness Thomas Fogarty, who was then a convict, serving out a term of imprisonment for defaulting as tax collector. This witness was rejected on the ground of incompetency, and defendants excepted. Defendants contended that it was immaterial whether plaintiff was deceived by Fogarty or not, unless it be shown that the county was aware of that before accepting the bond. But the court charged the jury that if plaintiff, being unable to read, signed the paper believing it to be a petition, as falsely represented, he was entitled to a verdict. The jury returned a verdict for plaintiff; whereupon defendant appealed.

A. W. Schalck (with whom was *G. D. B. Keim*), for appellant, cited *Graves v. Tucker*, 10 S. & M. 9; *Dennis v. Burritt*, 6 Cal. 607; *Stewart v. English*, 6 Ind. 176; *Kellman v. Smith*, 18 Tex. 835; *Plankroad Co. v. Stephens*, 10 Ind. 1; *Ferguson v. Glaze*, 12 La.

Schuylkill County v. Copley.

An. 667; *Sproule v. Lawrence*, 33 Ala. 474; *Ellis v. McCormick*, 1 Hilton (N. Y. C. P.), 313; *Rutland v. Paige*, 24 Vt. (1 Deane) 181; *Bank of Albion v. Smith*, 27 Barb. (N. Y.) 489; *Speer v. Whitfield*, 2 Stock. (N. J.) 107; *Ruiz v. Morton*, 4 Cal. 359; *Harper v. Pounds*, 10 Ind. 32; *Sanford v. Howard*, 29 Ala. 684; *Sanborn v. Chittenden*, 1 Williams (Vt.), 171; *Billings v. Billings*, 10 Cush. (Mass.) 178; *Dexter v. Clements*, 17 Pick. 175; *Fritz v. Commissioners*, 5 Harris, 131; *Taylor v. Meekly*, 4 Yeates, 79; *Conrad v. Farrow*, 5 Watts, 536; *Garrett v. Gonter*, 6 Wright, 143; *Keyser v. Keen*, 5 Harris, 327; *Grim v. School Directors*, 1 P. F. Smith, 219; *Fulton v. Wood et al.*, 10 Cas. 365; *Bredin v. Bredin*, 3 Barr, 81; *Irvine v. Lumbermen's Bank*, 2 W. & S. 206; *Wolf v. Carothers*, 3 S. & R. 240; *Whiting v. Johnson*, 11 id. 328; *Helser v. McGrath*, 6 P. F. Smith, 458; *Slate v. Peck*, 53 Me. 284; Starkie on Ev. 117, 118; Penal Code, March 31, 1860, § 65, Pamph. L. 400, Purd. 229, pl. 78; *Commonwealth v. Shaver*, 3 W. & S. 342; *Bickel's Ex'rs v. Fusig's Adm'rs*, 9 Cas. 465; 1 Greenl. Ev. § 373; 1 Phillips' Ev. 23, note 13; Wharton's Am. Crim. Law, § 760; *Little v. Gibson*, 39 N. H. 505; *Shay v. People*, 4 Park. (N. Y.) 353; *Shay v. People*, 22 N. Y. (8 Smith) 317; Wharton's Am. Crim. Law, § 761.

T. H. Walker (with whom was *M. Strouse*), for appellee, cited *Michener v. Cavender*, 2 Wright, 334; *Green v. North Buffalo Tp.* 6 P. F. Smith, 110; *Marshall v. Gougler*, 10 S. & R. 164; *Henning v. Werkheiser*, 8 Barr, 518; *Fulton v. Hood et al.* 10 Cas. 365; Roscoe's Crim. Ev. 414; *Commonwealth v. Rogers*, 7 Met. 500. They cited also *Sinclair v. Healy*, 4 Wright, 417; *Green v. Humphry*, 14 id. 212.

AGNEW, J. This was a feigned issue to try the question whether a certain bond, on which judgment had been entered under a warrant of attorney, was the deed of Peter Copley as one of the sureties of Thomas Fogarty, a collector of taxes. It was proved on the trial that Fogarty obtained the signature of Copley, who was an illiterate man, by representing to him that the paper was a petition to the county commissioners for his appointment as tax collector. The county contended that the deception mattered not, unless it be shown that the county had a knowledge of the fraud before accepting the bond. The court below held that the misrepresentation of the contents of the paper avoided it as a bond. The issue, therefore, was

Schuylkill County v. Copley.

the same as if, to a declaration on the bond, *non est factum* had been pleaded. The instruction of the court was right, and follows the distinction stated in *Green v. North Buffalo Township*, 6 P. F. Smith, 114, between a defense resting upon facts which are misstated in order to induce a party to enter into a bond, the contents of which he knows, and one resting on a misrepresentation of the contents of the instrument itself, to an *illiterate* person. In the former it was said the bond is the obligation of the party who seals it, but is avoided by the false inducement to enter into it; in the latter it is *not his deed* or bond at all. No authority was cited for this elementary principle, and it is argued that the second proposition is unsound. But it was the first resolution in *Thoroughgood's Case*, in the time of Lord Coke, 2 Reports, 9, b, in these words: "First, that although the party to whom the writing is made, or other by his procurement, doth not read the writing; but a stranger of his own head read it in other words than it in truth is; yet it shall not bind the party who delivereth it; for it is not material who readeth the writing, so as he who maketh it be a layman, and being not lettered, be (without any covin in himself) deceived, and that is proved by the usual form of pleading in such a case, that is to say, that he was a layman and not learned and that the deed was read to him in other words, etc., generally, without showing by whom it was read." The second resolution in *Thoroughgood's Case* was that an illiterate man need not execute a deed before it is read to him in a language he understands; but if he do, without desiring it to be read, the deed is binding. And see 2 Blacks. Com. *304-308. And says Mr. Chitty, in his Pleadings, Vol. I, *463, the defendant may give evidence under the plea *not est factum* that the deed was void at common law *ab initio*; or that it was obtained by fraud; or whilst the party was drunk, a married woman or a lunatic; or that it became void after it was made and before the commencement of the action, by erasure, alteration, addition, etc. See also 1 Saunders on Pl. & Ev. *407. The very point in this case was decided in *Stoevers v. Weir*, 10 S. & R. 25. That was an action on a single bill, to which a defense was set up that the writing had been obtained by falsely reading it as a receipt, and requesting the defendant to sign it as a witness. The plea setting forth the facts specially was treated, as a special *non est factum*. See also *Bauer v. Roth*, 4 Rawle, 93, 94, per KENNEDY, J. These authorities show that the learned judge committed no error in his charge.

But we think the court erred in the rejection of Thomas Fogarty as a witness on the ground of *infamy*. Fogarty had been convicted and sentenced for embezzlement of the county's money, as a tax collector under the 65th section of the act of 31st March, 1860, (Brightly's Dig. 229, pl. 78) and was in prison under his sentence. The punishment of the offense of embezzlement under this section is imprisonment by separate or solitary confinement at labor not exceeding five years, and a fine equal to the amount of the money embezzled. The punishment is the same kind as that inflicted for infamous offenses in Pennsylvania; but it is now settled that it is not the nature of the punishment, but of the offense, which determines its infamous character. 2 Russell on Crimes, 974; 1 Greenleaf's Ev. § 372, in note 3; 3 Casey, 465. Infamous crimes are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice; such as bribing a witness to absent himself, and not to give evidence, and conspiracies to obstruct the administration of justice, or falsely to accuse one of an indictable crime. 2 Russell on Crimes, 973; 1 Greenleaf's Ev. § 373. This is clearly the limitation of the infamous crimes as understood in this state: as may be seen in the following cases, *Commonwealth v. Shaver*, 3 W. & S. 342, 343; *Bickel's Ex'r v. Fusig's Adm'r*, 9 Casey, 464, 465. And see argument of counsel in *Commonwealth for Use v. The Ohio and Penn. Railroad Co.*, 1 Grant, 331, 332, 333, 334.

There are many offenses, involving both falsehood and fraud, which are punished as infamous crimes are usually punished in this State, and yet are not infamous crimes, and will not exclude the offenders as witnesses. *Commonwealth v. Shaver*, and *Commonwealth v. Ohio and Penn. Railroad Co.*, *supra*; 1 Greenleaf's Ev. § 373. In Massachusetts it is held that the offenses of receiving stolen goods knowingly, and cheating by false pretenses, will not render the offenders infamous. *Commonwealth v. Rogers*, 7 Metcalf, 500; *Uiley v. Menich*, 11 id. 302; and see 1 Whart. C. L. § 761. As remarked by Woodward, J., in 9 Casey, 465, the tendency of the judicial mind is against objections to competency. Such also is the direction of legislation, to be seen in § 181 of the act of 31st March, 1860, Brightly's Dig. 247, pl. 190, which gives to a convict who endures his punishment, for a felony or any misdemeanor punishable with imprisonment at labor, the advantage of a full par-

McHugh v. County of Schuylkill.

don, except as to willful and corrupt perjury. Fulfilling his sentence, therefore, restores the offender to competency as a witness. The act of 15th April, 1869, declaring that no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding, runs in the same direction. In all these cases the objection goes to the credibility of the witness rather than to his competency. For the error in rejecting the witness, the judgment is reversed, and a *venire de novo* awarded.

Judgment reversed.

McHUGH, appellant, v. COUNTY OF SCHUYLKILL.

(67 Penn. St. 331.)

Bond—forged signature—ratification, effect of.

The ratification of the signing of a bond, by an obligor whose signature was forged, does not render him liable thereon, there being no new consideration.

FICTITIOUS ISSUE between McHugh, as plaintiff, and the county of Schuylkill, to try the question whether a bond on which judgment had been entered, and which was purported to bear the signature of plaintiff, was his deed, and binding upon him. The opinion sufficiently states the case.

H. B. Graeff and J. W. Ryan, for appellant, cited *Duncan v. McCullough*, 4 S. & R. 483; *Chamberlain v. McClurg*, 8 W. & S. 31.

A. W. Schalck (with whom was *G. D. B. Keim*), for appellee, cited *Garrigues v. Harris*, 5 Harris, 354; *Martin v. Ives*, 17 S. & R. 966; *Hill v. Epley*, 7 Cas. 334; *Epley v. Witherow*, 7 Watts, 165; *Carr v. Wallace*, id. 400; *Potterson v. Lytle*, 1 Jones, 56; *Nass v. Van Swearingen*, 10 S. & R. 146; *Commonwealth v. Moltz*, 10 Barr, 530; *Leeler v. Vantuyke*, 6 id. 253; *Chapman v. Chapman*, 9 P. F. Smith, 214; *Bridge Co. v. Kline*, Brightly's R. 324; *Garrett v. Gonter*, 6 Wright, 143; *Page v. Trufant*, 2 Mass. 159; *Dorlan v. Sammis*, 2 Johns. 179; *Candor's Appeal*, 3 Cas. 119; *Whitney v. Allaire*, 4 Denio, 554; *Blydenburgh v. Welsh*, Bald. 331; *Ulingate v. King*, 10 Shep. 35; *Byers v. McClannahan*, 6 Gill & Johnson, 250; *Rhode v. Louthain*, 8 Blackf. 414; *Hill v. Scales*, 7 Yerger, 410.

READ, J. If the story told on the part of the plaintiff is believed, then his name was forged as a surety upon a bond given to the county of Schuylkill, by a collector of taxes, by the principal in the instrument. Assuming this to be a fact, for the purposes of the case, the question is, was the court in error either in its answers to the points, or in its charge to the jury? A forged deed is void. The plaintiff cannot write, and there is no mark to the name of James McHugh on the bond, and the name is proved to be in the handwriting of his daughter, who was directed by McKenna, the principal, to sign it, and if the testimony is believed, without a shadow of authority from the plaintiff, McKenna using the daughter and son as his innocent instruments in committing this crime. There is not a particle of evidence that the commissioners or any of the county authorities ever saw the plaintiff, but the whole testimony which is relied on to establish the plaintiff's liability, are vague conversations and declarations, from which approval, acquiescence or ratification are inferred.

From the answers to the defendant's points, and the charge of the court, the learned judge appears to have instructed the jury that if the plaintiff subsequently approved and acquiesced in this void act, or ratified it, or subsequently approved of it, then the bond was binding upon him. No new consideration of any kind was either alleged or pretended, and the cases of *Duncan v. McCullough*, 4 S. & R. 483; *Chamberlain v. McClurg*, 8 W. & S. 31, 36; *Goepp's Appeal*, 3 Harris, 428, show clearly that, under the circumstances, the act simply retains its original character, and is entirely void.

Judge ROGERS says, 8 W. & S. 36, "The principle which rules this part of the case is ruled in *Duncan v. McCullough*, administrator of Findley, 4 S. & R. 486. When there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation; what was once a fraud will always be so. The reason is, that a contract infected with fraud is not merely voidable, but void, and confirmation without a new consideration would be *nudum pactum*."

Can there be any doubt of the application of this rule to a forged bond or deed which involves the commission of a heinous crime, punishable with a fine not exceeding \$1,000, and imprisonment by separate or solitary confinement at labor not exceeding ten years?

The case of *Garrett v. Gonter*, 6 Wright, 143, has really no application whatever; for the alleged forged power of attorney was not

Zimmerman v. Anderson.

ratified at all, and the only alleged ratification was of a mortgage which was "executed in her name by a professed agent acting under a real or a pretended authority" — "to ratify that required no new consideration from the mortgagee."

In two cases this term, forgeries are alleged of sureties' names to bonds of collectors of taxes in Schuylkill county, and we believe embezzlements of the public moneys charged against the principals. The commissioners should certainly exercise more care and caution in selecting honest officials, and in taking good security.

Judgment reversed, and a venire facias de novo awarded.

NOTE.—It is well settled, that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority, becomes the act of the principal if subsequently ratified by him; but not so of the act of a person not assuming to act for but *personating* another. Story on Agency, § 351 a. In *Brook v. Hook*, Exch. 24 L. T. R. 34 (3 Albany Law Journal, 355), the court of exchequer held, that a forged note was not the subject of ratification. See also, *Williams v. Bagley*, L. R. 1 H. L. 300. The supreme court of New York, however, decided, at general term, that a person whose name has been forged to a note may ratify the act. The case, however was but poorly considered, and is not sustained by the authorities. *Howard v. Duncan*, 3 Alb. Law Jour. 331. See also, *Nesley v. Lindsey, ante*, page 437.—**REP.**

ZIMMERMAN *et al.*, appellants, v. ANDERSON.

(57 Penn. St. 431.)

A promissory note — negotiability.

A promissory note, payable to order, "with interest, waiving the right of appeal and of all valuation, appraisalment, stay and exemption laws," is negotiable.

ACTION on a promissory note by Zimmerman and Herdic, indorsees, against Anderson, maker. The note is as follows:

"TOWNSHIP OF BUFFALO, March 25, 1868.

"\$125.00.

"Six months after date I promise to pay E. W. Lowe, or order, one hundred and twenty-five dollars, for value received, with interest, waiving the right of appeal and of all valuation, appraisalment, stay and exemption laws.

"MOSES ANDERSON.

"Indorsed, E. W. LOWE."

The defense was a failure of consideration; which defense, defendant contended to be good, on the ground that the note was not

negotiable. The court held that the note was not negotiable, and excluded it from evidence; whereupon plaintiff excepted. Judgment for defendant. Appeal by plaintiffs.

G. F. Miller (with whom was *J. W. Maynard*), for appellants, cited *Grag v. Donahoe*, 4 Watts, 400; *McCormick v. Trotter*, 10 S. & R. 94; Act of April 5, 1849, § 11, Pamph. L. 427; *Purd.* 111, pl. 6; *Osborn v. Hawley*, 11 Ohio, 130.

J. C. Bucher and *J. M. Linn*, for appellee, cited *McCullough v. Houston*, 1 Dall. 444; *Lewis v. Reeder*, 9 S. & R. 197; *Camp v. Walker*, 5 Watts, 482; *Bullock v. Wilcox*, 7 id. 328; *Hughes v. Large*, 2 Barr, 104; 3 Kent's Com. 72, 76, 89; *Judah v. Harris*, 19 Johns. 144; *Overton v. Tyler*, 3 Barr, 346; Story on Promissory Notes, § 1.

READ, J. The paper in this case comes within all the definitions of the best text-writers of a promissory note, for it is a written promise by the defendant to pay to E. W. Lowe, or order, \$125, six months after date, for value received, with interest, absolutely and at all events. But it is urged that the words "waiving the right of appeal, and of all valuation, appraisements, stay and exemption laws," destroy its negotiability. In what way? They do not contain any condition or contingency, but after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability it adds to it, and gives additional value to the note.

In *Fancourt v. Thorn*, 9 Ad. & E., N. S. (58 E. C. L. R.) 312, a note in the following form was held to be a promissory note:

"London, 16th September, 1833. On demand, I promise to pay William Thomas Hodsell, or order, the sum of five hundred pounds for value received, with interest at the rate of four per cent, and I have lodged with the said William Thomas Hodsell the counter-part leases signed by George Davis, John Jewell, William Hill and William Gould, for ground let by me to them respectively, as a collateral security for the said five hundred pounds and interest. William Thorne."

So a note payable by installments is within the statute, although it contain a provision that on failure of payment of one installment

Zimmerman v. Anderson.

the whole debt is to become payable. Such a condition is not a contingency. *Carlton v. Kenealy*, 12 M. & W. 139.

The same doctrine is held by the lords justices. *In re General Estates Co., ex parte, City Bank*, 3 Ch. Appeal Cases, Law Rep. 758.

In *Hodges v. Shuler*, 8 Smith (22 N. Y.), 114, an instrument was held a promissory note which had the following words in the body of it: "or upon the surrender of this note, together with the interest warrants not due, to the treasurer at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date, to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the said period." Judge WRIGHT said, p. 118: "We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day, and although an election was given to the promisees upon a surrender of the instrument, six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of \$1,000 in four years from date, and its promise could only be fulfilled by the payment of the money at the day."

Mr. Parsons, in his *Treatise on Bills and Notes*, vol. 1, p. 147, says: "But if it leaves the payment, as to all circumstances of time, amount and person, as certain or at least as obligatory as before, and only provides or declares that certain security attaches to the note, or that certain rights go with it, or that the amount when paid is to be appropriated in a certain way, then it leaves the paper still negotiable." This doctrine is fully sustained by the cases cited in the note. In *Osborn v. Hawley*, 19 Ohio, 130, it was held that a power of attorney to confess judgment attached to the note, and, forming a part of the same instrument, did not destroy the negotiability of the note. The court said, that the power does not in any way change the legal character of the note, except that it gives a more summary proceeding for its collection.

These principles and cases clearly prove this to be a regular negotiable promissory note; but we are met by the case of *Overton v. Tyler*, in 3 Barr, 346, decided by this court a quarter of a century

Palairt's Appeal.

ago, which is, however, plainly distinguished from the one before us. In *Overton v. Tyler*, the payment was fixed for a day named specifically in the instrument, with a regular power of attorney to confess judgment, upon which a judgment was entered on the 10th March, and execution issued thereon on the 2d June, one day after the money was payable, and the waivers which followed all related to the judgment thus entered two months and twenty-one days before the paper fell due.

It is unnecessary to say how far this ruling is sustained by the authorities, for, if perfectly good and sound law, it does not touch the present case.

The court, therefore, erred in rejecting the note.

Judgment reversed and a venire facias de novo awarded.

PALAIRET'S APPEAL.

(67 Penn. St. 479.)

Constitutional law. Rents, extinguishment of.

An act of the legislature providing for the extinction of irredeemable ground-rents by compelling the rent-owner, at the option of the land-owner, to receive a gross sum and release the rents, is unconstitutional.

APPEAL from a decree of the court of common pleas. Proceedings were commenced in February, 1871, by John Gause, in the name of the commonwealth, against John G. Palairt, to effect the extinguishment of certain irredeemable rents which Palairt held upon Ganser's land. These proceedings were commenced under an act of the legislature of 1869. Section one of said act is as follows:

Section 1. Be it enacted, etc., That it shall be lawful for any owner of land, on or out of which any irredeemable rent has been charged or reserved, to apply by petition, in the name of this commonwealth, at his own relation, to the court of common pleas for the county in which such land shall be situated, for an order on the owner of such rent to show cause why a decree for the extinguishment thereof should not be made on his being compensated therefor, in the manner hereinafter provided; whereupon

Palairet's Appeal.

the court shall cause a citation to issue to the owner of the rent, according to the practice of the said court. * * * *

Section two provides the mode in which the extinguishment shall take place in case the land-owner and rent-owner do not agree upon the compensation, viz., by an assessment of damages by a jury, confirmation thereof by the court, and an order or judgment of extinguishment issued by the court. In the present case the proceedings were duly carried out, in accordance with the statute, and the court decreed the extinguishment of the ground-rents in question. The respondents appealed to the supreme court, contending that the statute was unconstitutional, as not being a valid exercise of the right of eminent domain and as impairing the obligation of contracts.

G. W. Biddle and *W. H. Rawle*, for appellants, cited *The West River Bridge Co. v. Dix*, 6 How. 529; *Pittsburg v. Scott*, 1 Barr, 314; *Keeling v. Griffin*, 6 P. F. Smith, 307; *Osborn v. Hart*, 24 Wisconsin, 89; *Whiting v. The Sheboygan Railroad*, 9 Amer. Law Reg. (March 1870), 156; *People v. Salem*, id. 487; *Ladlee v. Langham*, 34 Ala. 311; *Varick v. Smith*, 5 Paige, 159; *People v. Palatine*, 53 Barb. 70, *East St. Louis v. Louisiana St. John*, 47 Ill. 463; *Jones v. Tatham*, 8 Harris, 393; *Smedley v. Erwin*, 1 P. F. Smith, 451; *Jessup v. Loucks*, 5 id. 361; *Ervine's Appeal* 4 Harris, 256; *Norman v. Heist*, 5 W. & S. 174.

H. Wharton, for appellee, cited *Grim v. Weissenberg*, 7 P. F. Smith, 435; *Durack's Appeal*, 12 id. 491; *Bambaugh v. Bambaugh*, 11 S. & R. 191; *Price v. Taylor*, 4 Casey, 95; *Criley v. Chamberlain*, 6 id. 167; *License Cases*, 5 How. (U. S.) 589, 632; *Blaise v. Freeland*, 100 Mass. 140; *Price v. Maxwell*, 4 Casey, 23; *Miller v. Porter*, 3 P. F. Smith, 292; *Cooley on Constitutional Limitations*, 358; *Concord Railroad v. Greeley*, 17 N. H. 57; *Dingley v. Boston*, 100 Mass. 544; *Fiske v. Framington Manuf. Co.*, 12 Pick. 68; *Boston and Roxbury Mill Dam Corporation v. Newman*, id. 489; *Hagen v. Essex County*, 12 Cush. 477; *Olmstead v. Camp*, 33 Conn. 532; *Burgess v. Clark*, 13 Ired. 109. Lateral railroads are created on the same principle. The constitutionality of the laws creating them is upheld in *Harvey v. Thomas*, 10 Watts, 63; *Harvey v. Lloyd*, 3 Barr, 331; *Schoenberger v. Mulhollan*, 8 id. 146; *Hays v. Risher*, 8 Casey, 169; *Brown v. Corey*, 7 Wright, 495; *In the*

Matter of Townsend, 39 N. Y. 171; *Beckman v. Saratoga Railroad*, 3 Paige, 73; *West River Bridge Co. v. Dix*, 6 How. 507; *Mills v. St. Clair County*, 8 id. 589; *Richmond, etc., Railroad v. Louisa Railroad*, 13 id. 71; *Matter of Kew*, 42 Barb. 119; and cases in note to page 526 of Cooley on Constitutional Limitations.

SHARSWOOD, J. Retrospective legislation is certainly not in itself unconstitutional, unless so far as it has an effect prohibited by the fundamental law. If, however, an act of assembly, whether general or special, public or private, operates retroactively to take what is, by existing law, the property of one man, and, without his consent, transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Const., art. 9, § 9, which declares that no man "can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." If this is true of a person accused of crime, to whom literally the words are applied, *a fortiori* is it so as to one against whom no accusation is made? By the "law of the land," is meant, not the arbitrary edict of any body for men, not an act of assembly, though it may have all the outward form of a law, but due process of law, by which either what one alleges to be his property is adjudged not to be his, or it is forfeited upon conviction by his peers of some crime, for which by law it was subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula of words, without life or force. For what more can the citizen suffer than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? It will not have escaped notice that in the clause of the constitution referred to, property is put in the same category with liberty and life, and if an act of assembly can deprive a man of his property, without a trial and judgment for even legal cause of forfeiture, it may, in like manner, deprive him of his life or his liberty, imprison him in a dungeon or hang him without judge or jury. It is true that there are other more special declarations which give additional securities to liberty and life, but by classing all three together in this provision of the fundamental law, the people have declared their equal inviolability. There are also other special provisions as to security of property, adapted to the dangers with which, in democratic

Palaiet's Appeal.

- form of representative government, it is more especially threatened. But neither those clauses which relate to life and liberty, nor those which regard property, weaken the power of this grand primary inhibition, which the sturdy barons of England, arms in hand, wrested from their sovereign at Runnymede, *Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ.* This is still the corner-stone of our liberties. It becomes us to watch it with the greatest vigilance, not to suffer it to be undermined on any pretext, however specious. To this the most solemn sanction of our official oath applies with the greatest force, for while other parts of the constitution may be merely directory, the people have most solemnly and emphatically said, as to the ninth article, "to guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate."

It has become, then, a fundamental axiom of constitutional law, not only in this, but in every other State of this Union, that the legislative power cannot, either directly or indirectly, without the consent of the owner, take private property for merely private use, with or without compensation. In a case arising in Rhode Island, which, without a written constitution, except her charter of 15 Car. II, which invested the general assembly with power to make laws, "so as such laws, etc., be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of England, considering the nature and constitution of the place and people there," Mr. Justice STORY, delivering the opinion of the supreme court, held this language: "In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offense. Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people

Palairer's Appeal.

of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." He adds: "We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced." *Wilkinson v. Leland*, 2 Peters, 657. In this assertion he is fully sustained. A few leading out of a much larger number of cases may be cited. *Varick v. Smith*, 5 Paige (N. Y.), 137; *Hoke v. Henderson*, 4 Devereaux, 1; *Norman v. Heist*, 5 W. & S. 171; *Pittsburg v. Scott*, 1 Barr, 314; *Lambertson v. Hogan*, 2 id. 24; *Brown v. Hummel*, 6 id. 86; *Dale v. Medcalf*, 9 id. 108; *Austin v. Trustees of University*, 1 Yeates, 260; *Concord Railroad Co. v. Greeley*, 17 N. H. 57; *Gillan v. Hutchinson*, 16 Cal. 163; *Coffin v. Rich*, 45 Me. 509; *Southard v. Central Railroad Co.*, 2 Dutch. 13; *Kelly v. McCarthy*, 3 Bradf. 7; *Powers v. Bergen*, 2 Seld. 368. We need not stop to show that when such an effect is produced by the retrospective operation of a public and general statute, it is equally obnoxious to the objection as when directly attempted by a private, special act. The precedents make no distinction between the cases. *Greenough v. Greenough*, 1 Jones, 489; *McCabe v. Emerson*, 6 Harris, 111; *Bolton v. Johns*, 5 Barr, 149.

That this is the operation of the act of April 15, 1869, entitled "An act to provide for the extinction of irredeemable rents," Pamph. L. p. 47, upon the constitutionality of which we are now to pass, is, we think, very manifest. There was undoubtedly vested in the appellants, before the proceedings under this act were instituted in the court below, by the law of the land, an estate in an irredeemable ground-rent issuing and payable out of the lot owned by the appellee—an estate in fee simple, descendable, devisable, alienable. That estate, by the decree of the court appealed from, if valid, was extinguished; in substance, it was transferred and vested in the appellee and merged in the land. This was without the consent of the appellants. Why does it not fall within the well-settled principle before referred to?

Palairot's Appeal

It is contended that the property of the appellants has been taken in the exercise by the commonwealth of her right of eminent domain, which she may exercise herself or confer upon corporations or individuals. If so, as it is conceded, that full provision for compensation is made, it is within the saving of that other section of the declaration of rights: "Nor shall any man's property be taken or applied to public use, without the consent of his representatives and without just compensation being made." Const. Penn., art. 9, § 10. No doubt the right of eminent domain, being for the safety and advantage of the public, overrides all rights of private property. But for what public use has this estate of the appellants been taken and applied? It has been contended, as the preamble of the act declares, that "the policy of this commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is, and is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights." But if this is the kind of public use for which a man's property can be taken, there is practically no limit whatever to the legislative power. It would result that whenever the legislature deem it expedient to transfer one man's property to another upon a valuation, they can effect their object. What that department of the government considers and pronounces to be the policy of the commonwealth, the judicial department must accept as such. The members of the two houses, with the executive, are, upon all questions of policy, the exclusive exponents of the will of the people. Let us test the principle now involved, by a case more extreme than that before us, but which will be *experimentum crucis*. If we can show that a principle logically carried out leads to an absurdity, it is conclusive against it. Suppose, then, the legislature should adopt what has been a favorite theory with many political economists, that small farms are injurious to the community, prevent the full development of the agricultural resources of a country, and ought, therefore, as speedily as possible, to be united and formed into large ones. Then reciting this to be the true policy of the State, let them provide that every farm of less than 100 acres shall be attached to and become the property of the adjoining owner of a larger farm at a valuation to be determined by a jury. When the king of Samaria coveted the little vineyard of Naboth, hard by

his palace, that he might have it for a garden of herbs, and offered to give him a better vineyard than it, or, if it seemed good to him, the worth of it in money, he was met by the sturdy answer: "The Lord forbid it me that I should give the inheritance of my fathers unto thee." Would any one be hardy enough to stand up in a republican country and claim for its government a power which an eastern monarch dared not to assume? It was well marked by Mr. Justice GILCHRIST in the *Concord Railroad Co. v. Greeley*, 17 N. H. 57, that "even if the legislature should declare that an act taking the property of A. and giving it to B. as his private property was an application of it to public uses, no one would contend that such a declaration made that public which in its nature and object was private." It is not necessary to define what is a public use—it is quite sufficient to say that the object as set forth in the preamble of this act is not a public use within the right of eminent domain of the State. Other instances may be mentioned of the dangerous extent of this principle, should it be judicially approved that the declaration of a general policy will constitute a valid public use. In the course of the development of the immense mineral resources of this State, it has become very common to separate the estate in the mines from the estate in the surface. This has been held to be lawful—as in entire conformity with the established principles of the common law of England, which is the substratum of our system of jurisprudence. It may be found, however, in course of time to be a very inconvenient and even perilous state of things, more so than an intangible, incorporeal hereditament, such as a ground-rent. The legislature may adopt the policy of preventing it, and may well, by laws acting prospectively, prohibit the creation of such separate estates in the same land. But how, as to existing estates which have been lawfully created under the sanction of the law and the decisions of this court, are they to be subject to the legislative fiat? Can an act of assembly compel the owner of the minerals to surrender his property to the owner of the soil at the valuation of a jury? Can a law say that twelve men shall determine at what price I shall sell my property to another? In the consideration of the practical bearings of this question, we must strike out of the act of 1869 the provision that the compensation to be awarded shall not be less than twenty years' purchase of the rent. If this is a legitimate taking for public use, that clause might well have been omitted.

Palairot's Appeal.

Whenever property is so taken, all that is necessary is, that some impartial tribunal shall estimate the damages sustained by the owner, and, in the case of any corporate body or individual invested with such privilege, that such corporation or individual shall make compensation or give adequate security therefor before such property shall be taken. Const. art. 7, § 4. What would be the value of coal mines and mineral estates if the owners could be deprived of them at any time to be selected by the surface proprietor, by the valuation of a jury, upon the principle that private property may be taken from one man and transferred to another, on the ground that it is the policy of the commonwealth to put an end to such estates separate from the surface of the soil? There are many rights of way resting on express grant—bought and paid for—but now very burdensome and annoying to the owners of the land over which they pass? Can they be blown away by the legislature, upon this same plea? I say nothing of private roads laid out by authority of law and paid for, nor of ways resting upon prescription and lapse of time, on account of the first section of the act of April 21, 1846, Pamph. L. 416, which gives the courts of quarter sessions power to vacate such roads and ways without compensation, and the decision in *Stuber's Road*, 4 Cas. 199, which affirmed the constitutionality of that act, except individually to express my surprise that the same learned judge who wrote the opinion in that case, when he came to decide *Bagg's Appeal*, 7 Wright, 512, did not advert to his first opinion. It is enough for the present purpose to say that the decision in *Stuber's Road* is not put on the ground of the exercise of the right of eminent domain. That act excepts private roads resting upon express grant, the evidence of which is still in existence; and apart from the fact that no compensation is provided, it is evident that private property, though derived from express grant or contract, is not therefore exempt from the right of eminent domain. I put aside the decision in *Stuber's Road*, as resting upon grounds peculiar to itself, not affecting this argument. One more illustration of the extent to which the principle may be carried will be sufficient. A man provides by his will an annuity for his widow for her life, and charges it on his lands, or, if he dies intestate, the law does the same thing on partition among his heirs. Here is an incumbrance of the same character as a ground-rent, which, though not perpetual, may still continue for an indefinite period—the life of the widow. It is

within the policy recited in this preamble—it is an impediment to the free transmission of real estate, and a restriction on alienation which ought to be removed out of the way. If an act should be passed extinguishing this annuity of the widow on a valuation of her life interest—even though it were provided that it should not be less than the value fixed for such an annual sum by the annuity tables—would it not shock the moral sense and feeling of the entire community? Yet wherein does that case differ from the one before us, except in immaterial circumstances?

It is said that the act of November 27, 1779, 1 Sm. L. 479, commonly called the Divesting Act, by which the estates of the proprietaries were vested in the commonwealth, is an instance in which private property was taken on reasons of policy. That act, like the revolution from which its necessity arose, can be precedent for nothing in the ordinary course of legislation. It is well vindicated by its preamble, which claims that the rights of property and powers of government in William Penn and his heirs were stipulated to be used and enjoyed as well for the benefit of the settlers as for his own particular emolument, and that these rights and powers could no longer consist with the safety, liberty and happiness of the people. It is by no means clear that the commonwealth, on the principles of public law, had not a strict legal right to all that was resumed, and that the compensation she made was not an act of liberality, as indeed it is declared in the act to be in “remembrance of the enterprising spirit which distinguished the founder of Pennsylvania,” as well as in consideration “of the expectations and dependence of his descendants.” It is true that William Penn, in virtue of his patent from Charles II, was the owner in fee simple of all the soil of Pennsylvania, but it is also true that with the soil there was granted to him and his heirs many royal franchises and prerogatives which belong to sovereignty. The province was a feudal seignory, of which, while the crown remained paramount or liege lord, the Penns held the mesnality, and were, as they were termed, the chief lords of the fee. The statute of *quia emptores* was declared not in force. They stood, then, in many respects in the shoes of the crown. They accordingly maintained, in a long series of contests with the provincial assemblies, that their private estates—the manors and other property reserved by them from sale and settlement—were not the subjects of taxation. In the “Historical

Palairet's Appeal

Review of the Constitution and Government of Pennsylvania," published in London in 1759, which, though not written by Dr. Franklin, was composed under his direction (1 Sparks' Franklin, 245; 3 id. 105), the history of these contests is given, and it is shown how valuable the private estates were; the manors especially selected by their surveyors were the choicest lands to be found—the garden spots of the province. These private estates were all exempted from the operation of the divesting act. The unappropriated lands the assemblies never claimed to tax. These, with the purchase-money due in law or equity upon so much as had been appropriated by grant or supplement, and the quit-rents which formed a part of the purchase-money, were in all respects like the crown lands in the other colonies, which, it was universally conceded, passed by the revolution and treaty of peace acknowledging their independence and sovereignty, to the several States within whose charter limits they were situated. It was then a very grave question, and the tribunals before which only it could then be litigated would have been the courts of Pennsylvania, one of the parties to the suit, as the articles of confederation made no provision for such a case. It was wise, therefore, in the Penn family to accept the one hundred and thirty thousand pounds sterling granted to them, and that acceptance put an end to all question as to the constitutionality of the divesting act.

It has also been pressed upon us that private roads as well as lateral railroads are cases parallel with the act now before us, as in them, on mere grounds of policy, private property is taken for a private use, on compensation made. As to private roads, they originated at a very early period, by an act of assembly of February 20, 1735-6, Hall & Sellers, 188, re-enacted in the 17th section of the act of April 4, 1802, 3 Sm. L. 512, and incorporated by the revisers in the general road law of June 13, 1836, Pamph. L. 555; yet it was not until the year 1851, that the question of the constitutionality of these acts was raised before this court in *Pocopson Road*, 4 Harris, 15, a case from Chester county. The point seems to have been elaborately argued by Mr. P. F. Smith, for the appellant, and many authorities cited; but Mr. Lewis, for appellee, contented himself with citing *Harvey v. Thomas*, 10 Watts, 63. In the short opinion *per curiam*, affirming the proceedings, no notice whatever was taken of the point. In some of our sister States similar acts have been held to be unconstitutional. *Taylor v.*

Porter, 1 Hill, 140; *Clack v. White*, 2 Swan (Tenn.), 450; *Dickey v. Tonnison*, 47 Mo. 373; but their constitutionality was well vindicated in *Hickman's Case*, 4 Harrington, 580, in which it is said, in the opinion of the supreme court of Delaware: "It is a part of the system of public roads, essential to the enjoyment of those which are strictly public; for many neighborhoods as well as individuals would be deprived of the benefit of the public highway, but for outlets laid out on private petition and at private cost, and which are private roads in that sense, but branches of the public roads and open to the public for the purposes for which they are laid out." As to lateral railroads, the constitutionality of the act of May 5, 1832, Pamph. L. 501, was eventually sustained, not upon the ground assumed in *Harvey v. Thomas*, 10 Watts, 63, but upon the better reason, that the public had the use of them for the purpose for which they were used. *Hays v. Rischer*, 8 Casey, 169; *Brown v. Corey*, 7 Wright, 495; *Keeling v. Griffin*, 6 P. F. Smith, 307. It is not necessary to examine those cases in which, in some of our sister States, acts authorizing mill-owners to flood the lands of an upper riparian proprietor, on compensation, may have been held good. "They were designed," says Chief Justice SHAW, "to provide for the most useful and beneficial occupation and enjoyment of natural streams and water-courses, where the absolute right of each proprietor to use his own land and water privileges at his own pleasure cannot be fully enjoyed, and one must of necessity in some degree yield to the other." *Fiske v. Framingham Man. Co.*, 13 Pick. 68; *Hazen v. Essex Co.*, 12 Cushing, 475.

I pass from the argument that this act is an exercise of the right of eminent domain. I have given more particular attention to it, because it is evidently the ground upon which the lawmakers themselves placed their right to pass the act in question. That respect which is due by this court to the co-ordinate branch of government, made it proper that this point should be fully examined and discussed.

If this act cannot be sustained on this ground, then it seems clear that it impairs a contract, and is therefore prohibited as well by the constitution of the United States, art. 1, § 10, as by the constitution of this commonwealth art. 9, § 17. Here is a perpetual covenant — personal, as to the original covenantor, but running with the land — to pay an annual rent issuing out of it; and the

Palairot's Appeal

act, by the proceeding under it, authorizes a decree which releases one of the parties from the performance of his contract upon the doing of a collateral act, not stipulated in the contract itself. No one has ever supposed that an act of assembly could authorize, in the case of a lawful existing contract, one of the parties to tender a collateral thing in satisfaction or extinguishment of it, whatever the value of that thing might be, as compared with the damage sustained by the breach. Yet, in effect, that is just what is done by this act. The covenant is to pay an annual rent forever; a jury are authorized to say what principal sum shall be a satisfaction and extinguishment of that covenant; a collateral thing not provided for in the contract, and which might as well be anything else than money.

Two other positions have been taken to sustain this act, which it is proper to notice. It is urged that after all it is only the exercise, by the legislature, of the power to authorize the conversion of land into money; a power frequently exercised, and confirmed by this court in *Norris v. Clymer*, 2 Barr, 285, and *Sergeant v. Kuhn*, id. 393. But this power to authorize conversion has never been recognized as constitutional by this court, except in the case of property of persons under disabilities, or where there were contingent interests, whose owners had not come into existence, and that, too, with the consent of those standing in the fiduciary relation of trustee, guardian or committee. The cases in which such conversion may be authorized seem well enumerated in Mr. Price's valuable act of April 18, 1853, Pamph. L. 503. But it has been expressly repudiated and denied in the case of owners *sui juris*, not consenting, nor presumed from acquiescence to have consented. "There is no adjudicated case," says Mr. Justice COULTER, in *Ervine's Appeal*, 4 Harris, 264, "where the legislature ordered the sale of one man's land when he was *sui juris*, under no legal disability to act, for the benefit of another person also *sui juris*, and where such legislative decree was sustained." In *Fullerton v. McArthur*, 1 Grant, 232, the objection was made by a stranger; twenty years had elapsed without complaint by any one of the owners; and it was held that the presumption was conclusive, that the act had been passed with their consent. In *Kneass's Appeal*, 7 Casey, 87, it was expressly held that the legislature had no power to authorize the sale of the property of parties *sui juris*, and seized of a vested estate in the premises, against their consent. "Where it is judicially estab-

lished," said Chief Justice LEWIS, "that the estate of tenants in common cannot be divided without prejudice, or spoiling the whole, and where no one of the parties will take the property at the valuation, the power to sell is exercised by the courts, and this power is derived from the legislature. But it is justified by the necessities of justice; the parties in interest cannot otherwise enjoy their rights; and a sale in such a case is as valid as a judicial sale for payment of debts." See also *Powers v. Bergen*, 2 Selden (N. Y.), 368.

The remaining position to be considered is, that the constitutionality of this act can and ought to be sustained under the general power of the legislature to regulate property and to modify its incidents. But while it is true that this power is unlimited as to all future acquisitions by persons natural or artificial, the cases and precedents already referred to abundantly show that, wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person, so far as it has that effect, it is unconstitutional and void. Every power which the legislature possesses is subject to the prohibitions contained in the declaration of rights, and one of them, as we have seen, is, that they cannot take the property of a man, except for public use, without his consent. Perhaps no more apposite illustration of this is to be found than in the case of rights and titles acquired under statutes of limitations. "Suppose," said Mr. Justice ROGERS, in *McCabe v. Emerson*, 6 Harris, 112, "after title acquired to a tract of land by the act of limitations, the legislature should extend the time; or suppose a writ of error barred by a lapse of time, would any person contend that the legislature would have a constitutional authority to interfere so as to affect rights thus acquired? This will scarcely be pretended." *Ervine's Appeal*, 4 Harris, 256; *Bagg's Appeal*, 7 Wright, 512; *Billings v. Hall*, 7 Cal. 1; *Knox v. Cleveland*, 13 Wis. 245.

The act of March 31, 1812, 5 Sm. L. 395, concerning joint-tenancy, has been referred to as abolishing the incident of survivorship in existing estates, and held by this court, in that respect, to be constitutional in *Bambaugh v. Bambaugh*, 11 S. & R. 191. But in that case, Chief Justice TILGHMAN said: "There is no force in the argument, that the operation of the act on existing estates was an invasion of vested rights. Who should be the survivor, was in contingency, and in the meantime either joint-tenant might have

Palairot's Appeal.

severed the estate by legal means, without the consent of his companion. * * * The act deprived no man of his property. When a title had already accrued by survivorship, it remained untouched." The act of April 27, 1855, Pamph. L. 358, converting estates tail into estates in fee; has been referred to, but that act is prospective, and applies only to all estates thereafter created. But even if it had applied to all existing estates tail, which perhaps it might (*De Mill v. Lockwood*, 3 Blatchford, C. C. Rep. 56), of what value is the property of issue in tail or remaindermen which can be barred without their consent by the deed of the tenant in tail? It would be very different with a remainder after a life estate. In *Bumburger v. Clippinger*, 5 W. & S. 311, this court refused to compel a purchaser to take a title depending upon an act of assembly authorizing a tenant for life to sell in fee and invest the proceeds. To the same effect is *Rogers v. Smith*, 4 Barr, 101. And in *Ervine's Appeal*, 4 Harris, 256, such an act was directly held to be unconstitutional and to give no title. In *Schafer v. Eneu*, 4 P. F. Smith, 304, an estate was devised in 1851 to a woman for life, remainder to her children. She left no children issue of her body, but children adopted in conformity with the act of assembly of May 4, 1855, § 7, Pamph. L. 431. "If the act were construed," said Mr. Justice STRONG, "as it is claimed by the plaintiff in error, as applied to the present case, it would work a result which it is not in the power of the legislature to effect. The will of James Eneu took effect in 1851. It gave a life estate in the rent to Mrs. Clark, with a contingent remainder to her children, and the residue of his estate to his children, naming them, in fee. The children thus named (and the children of such as are deceased) are the defendants in error. They had a vested interest in the rent when the act of 1855 was passed. It was not in the power of the legislature to take away that vested interest and give it to such persons as Mrs. Clark might adopt." No case could well be framed more directly in point to show that when the effect of any change or modification of the rules or incidents of property is to transfer a vested estate from one person to another, it is so far ineffectual and invalid.

Upon the whole, then, we have come to the conclusion that the act of April 15, 1869, is unconstitutional and void. The particular provisions of this act seem just and reasonable; but they are not features which affect the character of the act as contrary to the

Palairt's Appeal.

fundamental law — the *lex legum*. We are bound to look at the principle upon which it is based, and its logical and necessary consequences. As it appears to us, it would overthrow the most valuable barriers which are reared against legislative tyranny, and make all property to be held by a most insecure and uncertain tenure. This act may be but an entering wedge. Its salutary and conservative restrictions may be repealed hereafter without touching its principle, upon which rests the question of its constitutionality, and every man will then hold his ground-rents — and the same provision may be extended to other kinds of property — upon the will of a jury in determining for what price he shall be compelled to sell them.

Judgment reversed.

AGNEW, J. This case has been argued as if the ground-rent owner had been *deprived* of his property by a *taking* for private use, contrary to the constitution of the State. In my judgment this is not the character of the law — it is *remedial* rather than aggressive. The act is entitled an act for the extinction of irredeemable rents, and recites the irredeemable charge upon the land as an obstruction to the exercise of the rights of ownership over the property, and as contrary to the policy of the commonwealth, which has been to remove restrictions upon alienation, and to encourage the free transmission of estates. It then provides a remedy, if the parties cannot agree, whereby the ground-rent may be valued and appraised, the price paid to the ground-rent owner, and the rent thus extinguished. It is evident that the ground-rent is not taken, but is only converted, by act and operation of law, to free the land from the burden imposed upon it. The owner of the ground-rent is not deprived of his property, but for a proper purpose is compelled to take it in another form. The argument against the law, proceeds on the ground that the rent is a *separate estate* issuing out of the land, and affirms that, because it is separate, it cannot be changed or converted. But separateness of interest is no bar to a remedy. The estates or interests of joint tenants, tenants in common, tenants for life, and in remainder, and trustees and *cestui que trusts*, are equally separate, each holding his particular interest to and for himself. It is the fact that both interests belong to a single subject of property, and are so intertwined together that they operate as a hindrance to the several owners

Palairot's Appeal.

to exercise their rights freely for their own interests, which makes them the subject of remedy. In the present case the estates are separate; one is corporeal and the other incorporeal, it is true, but both inhere in a single subject, and grow from the same stem. The incorporeal follows the corporeal into every inch of soil, and its existence is so incorporated with the land, and so permeates and surrounds it, that the owner and occupier of the ground is for ever subject to its domination, no matter what use or purpose he may desire to make of his land. It is not like a division of ownership by lines on the ground, or by horizontal lines, as coal and minerals held separately, where each owner holds independently, and no further partition is needed, but the ground-rent is a charge on every part and parcel, and the owner of the land for ever stands beneath the encumbrance. In its own essence, what is the ground-rent but a sum of money, annual in the form of a rent, single when capitalized by appraisalment? To the owner it is only money, whether in the form of capital or the interest upon that capital. In what does a ground-rent differ from an interest-mortgage, which, if irredeemable, must forever consume the profits of the land? Is no time a bar, and can it never be satisfied? But as to the land-owner the case is essentially different — the rent is a burden bound upon the back of the land, a load under which it must stagger for centuries, until willing parties can be found to unstrap the burden. This the law says is contrary to the policy of the State. Is there no remedy for it? Is it in the power of two men by the exercise of their joint wills, in the form of a deed, so to bind up the lands of the State, in perpetual chains, that even future generations cannot unwind their links? Must the burden continue for a thousand years, and if then no one be found willing to unbind it, shall it continue a thousand more? The law is that no one can by will, or deed, or trust, create a perpetuity in lands longer than a life or lives in being and twenty-one years and nine months thereafter. Dead generations are not the lords of the soil, nor can they impose their shackles upon the men or property of future generations. When, therefore, a burden such as this clings to the land, like the old man of the mountain upon the back of Sinbad, there must be a power in government to shake it off, and let the land go free. It cannot be that all the lots and lands of a great city shall be bound up forever in irredeemable rents to the injury of owners, and of commerce, without a remedy.

What, then, is the purpose of this act? It does not seek to take

the ground-rent from its owner for public or for private use, but simply to transmute an annual sum of money into its equivalent sum of capital, in order that the impolitic, perpetual union of two estates, growing from a single stalk, may be separated for the welfare of the State. Are not the powers of government adequate for this? In thinking and speaking of the power of eminent domain, we are apt to be controlled in our thoughts by the commonest mode of its exercise, to wit, the taking of land for public use. But this is not its only form. Domain here means dominion, and it is eminent because of its high control. This high power or dominion of the State is not confined to a single mode of exercise, though seldom seen or thought of in others, but is to be found in all those forms grouped under the name of the police power of the State—a power exercised for the welfare of the people, and rendered necessary by the circumstances which affect the common good. Hence, laws for the preservation and promotion of peace, good order, health, wealth, education, and even general convenience, are supported under the police power of the State. Under these laws personal rights, rights of property, and freedom of action may be directly affected, and men may be fined, imprisoned and restrained, and property taken, converted and sold away from its owner. The principle of such laws is most easily perceived and recognized when men are held liable for nuisances, acts and negligences affecting the health and safety of society, when the marriage contract is dissolved, and when property is subjected to charges and sale for matters affecting the public interest and welfare. Beyond this is a wide domain of general convenience where the power is also exercised. Thus, estates held in joint tenancy and common may be divided among the tenants even by conversion and sale, life-estates and remainders may be separated from each other, qualified inheritances expanded into absolute fees, and contingent and executory interests extinguished. What greater reason has the owner of an irredeemable ground-rent, coming down from a former generation, to complain that his estate is appraised, converted into capital, and paid over to him in order to unfetter the land, than the owner of a life estate in the land itself, or the owner of a remainder or reversion, or of some contingent or executory interest? All alike bow before the power of the *parens patriæ*, exercised for the good of all the children of the State.

The reply that is made, that the purpose is to make partition in

Palairot's Appeal

some of those cases, and to unfetter the estate in others, states no real difference and makes no just distinction. In this case it is no more than a mere partition between the owner of the land and the owner of the rent. The union here is really more intimate, and the shackle upon the land more tight, than in the case of a widow's third, a life estate, an estate in common or joint tenancy, or a charge in the title. Yet these interests may be reached by judicial proceedings, and even a sale, conversion and extinguishment to effect a separation among the owners. The right of survivorship in joint tenancy existing before the act of 1812 was held to be liable to a legal extinguishment. *Bambaugh v. Bambaugh*, 11 S. & R. 191. Even special acts for the conversion of estates have been held to be valid. *Norris v. Clymer*, 2 Barr, 277. In that case Chief Justice GIBSON said: "But the constitutionality of the act stands on much safer ground than a chancery power unseparated from the other powers of the government, and reserved to the legislature. It stands on the notions of parliamentary power brought by our forefathers from the land of their birth, and handed down to their descendants unimpaired, in the apprehension of any one, by constitutional restriction of ordinary legislation. A list of nine hundred statutes, in principle like the present, has been laid before us; some of them enacted at the instance of judges of this court, some at the instance of law judges of the common pleas, and some at the instance of learned and eminent lawyers, most of whom executed trusts under them without suspecting that their authority was prohibited by the constitution. It is not above the mark to say that ten thousand titles depend on legislation of this stamp."

This remedial legislation, as he calls it, he further remarks, has prevailed from the foundation of the province to this day. After reciting the only provisions in the bill of rights against the privation of property, and taking it for public use without just compensation, he adds, "Now, it cannot be said that this statute has deprived any man of his property, or applied it to any use but his own." This case was reaffirmed in *Sergeant v. Kuhn*, 2 Barr, 393; *Kerr v. Kitchen*, 5 Harris, 434; *Morris v. City of Reading*, 9 id. 201, 202. It is true that *Norris v. Clymer* was slightly impugned by a divided court in *Ervin's Appeal*, 4 Harris, 256, BELL and GIBSON, C. J., dissenting. There it was held that a special act for a sale and conversion was invalid because the devisees interested in the estate were all *sui juris*, and able to convey them-

Palairot's Appeal.

selves. The same distinction as to persons *sui juris* was afterward taken in *Kneass's Appeal*, 7 Cas. 87. But it may well be that in ordinary cases, where owners are *sui juris*, the law will not compel conversion, for in such cases there is no necessity, or great purpose of public policy, to invoke the high power of dominion or police of the State. But the fact that owners are *sui juris* does not in itself prevent partition or severance of interests in a single thing. Hence we have laws for partition, valuation and sale in the orphan's court and common pleas, and proceedings to effectuate the same thing in equity, whether parties be of age or minors, the purpose being not privation of right but a separation of interests. Then what clause of the constitution does the act for the extinguishment of ground-rents violate? It does not deprive the ground-rent owner of his property, or take it for any public or private use. It merely dissolves the relation between him and the owner of the land out of which the rent issues, and gives him a capital sum of money in lieu of an annual sum. Nor do I hold this can be done in an ordinary case between the parties to the deed, or the survivor and others, or alienees of both in their lifetime or for twenty-one years afterward; but only when by lapse of time the contract relation between parties long in their graves becomes a subject of regulation, for the good of a subsequent generation of men. I know it may be said that the act itself makes no distinction. This is true, but it does not follow that the act is therefore void. A law, like a writing between private parties, must have effect where it can operate. This is a question of power, and to the extent of the power its exercise must be held to be valid. Though a deed fail to express the grantor's power, and on its face may seem to transgress it, yet if he have a power to convey, it will operate to that extent. So, though this act may not operate on existing parties to a deed or their survivors, or for twenty-one years afterward, if it can then operate we must recognize its validity to the extent of lawful legislative power. All men are supposed to know the law, and that its policy forbids perpetuities, and therefore, though their deeds may bind themselves and their immediate successors, they cannot bind posterity for all time to come.

I think the law can be impugned only on the ground that it impairs the validity of a contract; and to this extent I agree that it is not competent for the legislature to sever the ground-rent from the land to which it is attached by its contract relation as between

Palairet's Appeal.

the parties to the contract and their immediate privies, to the extent that it is in the power of men to create a perpetuity, but no further. Beyond this, to carry the sanctity of a contract is to make the act of two individuals raise higher than the powers of government and the interests of the State, and to dominate both the power of the legislature and the rights of the people. It cannot be that the contracts of a past generation are beyond the reach of law for a proper purpose, a purpose not to destroy, but to change, to suit the interests of the State. Otherwise a contract would stand on a higher platform than that of the people to change their form of government. A change of the State constitution would effect nothing, for the contract standing on the higher ground of the federal constitution would still claim its protection, and thus descending on unborn generations, would cling like the fatal shirt of Nessus, until escheat or an earthquake should end it. I think, therefore, that the legislature can sever the rent from the land by a fair valuation and payment in money in the case of a ground-rent deed, all of whose parties are dead and more than twenty-one years have elapsed since the death of the last survivor. But as these facts do not appear in this bill and answer, the judgment should be reversed.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

SIMMONS, appellant, v. THOMAS, Sheriff, etc.

(43 Miss. 31.)

Husband and wife—judgment against husband in favor of wife.

A judgment in favor of a wife against her husband, rendered by default in a court of law, is valid.

SUBMISSION to obtain the appropriation of money brought into court by Thomas, sheriff of Hinds county. The opinion states the case.

C. A. Mount, for appellant, cited *Michie v. Planter's Bank*, 11 How. 13. *G. S. Potter* on the same side, cited 1 Chitt. Pl. 22; *Miner v. Miner*, 3 Term R. 631; *Candall v. Shano*, 4 id. 361; *Morgan v. Painter*, 6 id. 265; *Coney's Dig.*, tit. Abatement, E. 6, H. 42; *Lee v. Maddox*, 1 Leonard, 165; *Perry v. Boilean*, 10 S. & M. 210; *Lyman v. Allen*, 7 Vt. 508; *Repp v. Elliot*, 1 Yeates, 185; 1 Bright, Husband and Wife, 69; 2 Saunder's Rep. 101, *d. c.*; *Smith v. Allen*, 39 Miss. 469; Statute Laws, Penn. 996; *Goodyear v. Rambeau*, 13 Penn. Rep. 480; 47 Penn. Rep. 307; *Tyler on Infancy and Coverture*, 728; *Emerson v. Clayton*, 32 Ill. 493; *Rodemeyer v. Rodman*, 5 Iowa, 428.

T. J. Wharton, for appellees, cited 1 Bl. Com., marg. p. 443; *Levy and wife v. Jarden*, 38 Miss. 57; *Wiley & Co. v. Gray et*

 Simmons v. Thomas.

al., 36 id. 510; *Allen v. Miles & Adams*, 26 id. 640; *Bell v. Tombigbee R. R. Co.*, 4 S. & M. 547; *Green v. Creighton*, 10 S. & M. 159; *Work v. Harper*, 24 Miss. 517; *Wall v. Wall*, 28 id. 409; *Plummer v. Plummer et al.*, 37 id. 185; *Monderville v. Stockett*, 28 id. 388; *Shirley v. Fearn*, 33 id. 653; *Hardy v. Gholson*, 26 id. 70; *Garrett v. Felt & Reed*, 31 id. 137.

SIMRALL, J. Samuel B. Thomas, late sheriff of Hinds county, brought in the circuit court of Hinds county, a sum of money raised by sale, under executions, of the property of S. E. Simmons, judgment debtor, and submitted to the court its appropriation.

The money was realized, under executions, as follows: In favor of Caroline Simmons against S. E. Simmons, on judgment dated 17th May, 1866, for \$16,651.30, in favor of Andrew Thomas; against same defendant on judgment recovered 23d November, 1866, for \$323.45, in favor of J. B. Thomas; on judgment against the same, recovered the 22d day of November, A. D. 1866, for \$840.88.

Caroline Simmons and Andrew Thomas each claimed the money. The court below ordered its application to the judgment in favor of Andrew Thomas. The evidence adduced at the hearing was embodied in a bill of exceptions, and the case is brought here by the plaintiff in error, who assigns for error that the court erred in not directing the money to be paid on her judgment.

It was proved that Caroline Simmons, at the date of instituting her suit and the recovery of judgment, was the wife of S. E. Simmons the debtor; that she owned separate property, derived from her father, D. O. Williams.

The records of the two judgments were also in evidence.

The point which has given us most trouble is, whether the judgment in favor of the wife against the husband, being rendered by default in a court of law, is or not void.

The common law regarded the husband and wife as one person; therefore the husband could not give an estate to the wife, nor the wife to the husband. Co. Litt., 187 b; 102 a. So a husband cannot contract with his wife. 2 Wilson, 254. This is the doctrine wherever the strict common law prevails. In equity, where the principle is otherwise, two centuries ago it was held in England that a gift by husband to wife, without a trustee, was good in equity.

It has long since been conceded in the equity courts that post-nuptial settlements and contracts may be upheld without a trustee. Story Eq. § 1380; 4 Barb. 404; 9 Paige Ch. 363; 2 Russ & Mylne, 197.

The reason why access was refused to a court of law, to the wife, was for the want of legal parties, and also on reasons of public policy. Whilst this was so, the wife was, as to her private property, a *feme sole*, and could charge it with debts. And the rule at law became so far relaxed that there might be transactions and dealings between each other which would be recognized and upheld in equity. A husband gave his note to his wife for money borrowed from her, and which she had as part of a former husband's estate. This created a liability enforceable in equity. 10 Ohio, 371. Nor does it matter from what source the money comes to the wife, if it was her separate property. 3 P. Wms. 377; 3 Paige, 452; 3 Dessausure, 168.

Courts of equity look to the substance, and not to the forms of these transactions, and regard husband and wife as distinct persons when they have, as respects each other, distinct property interests. 19 Verm. 410; 24 id. 375.

The books are full of illustrations of the doctrine that there may be direct dealings between husband and wife.

A deed from the husband to the wife is valid as between the parties, and good as to strangers, if resting on a valuable consideration and honest motive. 28 Miss. 717; 24 id. 181; 25 id. 160.

The husband, for value and *bona fide*, indorsed and delivered a negotiable note to the wife; she took the paper with the rights of any other indorsee. 38 Me. 68.

If the note be payable to the wife, her indorsement (the husband assenting) passed the title. 10 Cush. 291.

Authorities are abundant that post-nuptial settlements are good where a valuable consideration existed, such as a *bona fide* indebtedment to the wife, or where her property has been appropriated by the husband. 161 Vesey, 146; 6 Johns. Ch. 57.

A voluntary settlement made by a husband, not indebted at the time, was good as against subsequent creditors. 8 Wheat. 220.

There is no doubt that the relation of debtor and creditor may subsist substantially between the husband and wife. It would not be brought in question by the learned counsel for the defendants in error, that Mrs. Simmons might well have

brought her bill in chancery against her husband, and had proper relief, taking all the matters set up in her declaration. True, she ought to sue by her next friend, but she would be the only party in interest, nor would it be doubted that, if the facts warranted it, a pecuniary decree *in personam* might go against the husband, to be enforced, like this judgment, by ordinary *steri facias*. The relief rests on the equity, that the husband, by the transactions had with his wife touching her separate property, has become her debtor. The law is inadequate on account of its system of pleading and practice to give this relief. Technically the wife is *sub potestate viri*, and has no separate adversary status in its courts against the husband. But the "right" of the wife *subsists*, and the subject at last is reduced to this, that she has applied to the wrong forum to assert her right. But can this objection be made against Mrs. Simmons in this case? The defendants in error are not parties *or privies* to the judgment of Mrs. Simmons. It does not bind or affect them, except that it is a debt of record, with all the incidents and advantages of a judgment, and the record is conclusive evidence against them that it is a "judgment." In that respect it proves itself, and is unimpeachable. If it had been placed on record, by plea, that Mrs. Simmons was under coverture, her suit would have abated. Lord BACON says: "A man shall never assign for error that which he might have pleaded in abatement, for it shall be accounted his folly to neglect the time for taking that exception." At common law, personal disabilities become subjects of judicial cognizance only as connected with some right or duty, which, by reason of the disability, such as coverture, infancy, etc., the party is incapable to assert. The mode of availing of it varies, as the party under disability is plaintiff or defendant.

The disability always implies a right, but an inability to assert it. If the defendant neglects, by plea in abatement, to object the coverture of the plaintiff, but demurs or pleads in bar, he must be taken to have waived it, and cannot avail of it on writ of error. *Lyman, Admr., v. Albe, Admr.*, 7 Vermont, 509. If the abatable matter occurred after plea to the merits, it may be set up in a plea *puis darrien continuance*, if interposed at the earliest moment, according to the course and practice of the court. But if the disability be to the writ, or the person of the plaintiff, and it existed at the time the defendant appeared and pleaded to the merits, he will

thereby waive all benefit of such disability, and is estopped from procuring it, or in any form taking advantage of it. *Wilson v. Hamilton*, 4 Serg. & Rawl. 238. But these defendants in error may say that, not being parties to the suit, they had no opportunity to set up the coverture of Mrs. Simmons. Neither can they be heard, in a collateral suit like this, to put forward exceptions to the proceeding in her suit, which were not made by the defendant.

In late years there has been a great enlargement of the property rights and interests of married women, in this and many of the other States.

The scope of this legislation has been to secure to her the *corpus* of the property which she brought into the marriage, or subsequently acquired, and also to give to her the income and revenues of her separate estate, free from the right, use of, or disposition on the part of the husband.

In Pennsylvania, where this sort of legislation exists, she has been permitted to sue in her own name, in respect of her separate estate. *Goodyear v. Rambaugh*, 13 Penn. 481.

The Illinois statute of 1861 embraces the same provisions, in effect, as respects the separate property of married women, as articles 23 and 24 of the Code, p. 335 and 336. Perhaps the Illinois statute, in describing the "interest" of the wife, may be a little broader than ours.

In the case of *Emerson v. Clayton*, 32 Ill. 496, the wife in her own name brought replevin for chattels, her separate property; her coverture was pleaded in abatement. The plea was held bad, on the ground that the entire interest in the property was in her. There was no necessity to "join her husband in an action to recover it, or for trespasses upon it."

Under a somewhat similar statute in Pennsylvania, in the case of *Goodyear v. Rambaugh*, 13 Penn. 481, the right of wife to sue without joining the husband, was also recognized.

Samuel Shade confessed a judgment in favor of his wife Elizabeth Shade, for \$600. Under judgment, the land of Samuel Shade was sold, and proceeds brought into court for distribution. After paying prior liens, the wife would be entitled to \$74, in her judgment, if valid. The law of that State, securing the separate property interests of the wife, and the judgment not being assailed for fraud, the residue of the money was ordered to be paid over on it.

Subsequent to this, in the supreme court of the same State, occurred the case of *Moore's Appeal*, 47 Penn. Rep. 308.

Jesse Moore, the husband, confessed judgment in favor of his wife. The points arose on motion to distribute money.

The court say: "Here is a judgment given by husband, to secure the wife's separate estate. We are asked, on a mere question of distribution, to pronounce it void, upon the legal fiction that they are one person in law."

After reviewing the departures which had been made from this "legal unity," by the courts of equity, in giving full effect to the separate property interests of the wife, which it fostered and protected, the court adds: "Here we have a judgment, regular on its face; Moore, the defendant, was *sui juris* capable of giving it, while the marriage is a fact, *de hors* the record." Then what is there in the legal discretion of the court to inquire into the validity of the judgment? If marriage is suggested—there being no fraud alleged—the answer is, the law protects her estate, and equity sustains the instrument which represents it; and why should the court lend its aid to overturn the judgment?

The summary of the judgment is: The estate, both in *corpus* and income, is preserved to the wife. The claim which, in this case, was merged into judgment, is due and owing, so far as the record shows. Equitably, it ought to be paid. We do not feel at liberty, in a collateral controversy of this sort, to hold the judgment void. To do so, would be reactionary to the spirit and scope of modern legislation in the interest of married women.

The case last cited, if accepted as authority, fully sustains this view. The defendant in error, Thomas, could have shown, if the facts would have maintained it on the hearing of the motion, that the judgment in favor of Mrs. Simmons "was had, made, or contrived of malice, fraud, covin, collusion, or guile, to the intent to delay, hinder, or defraud creditors of their just rights," etc., etc.; but there was no issue of this sort made.

If the judgment had been successfully assailed on these grounds, then the judgment would have been utterly void.

Let the judgment of the circuit court be reversed, and judgment rendered in this court that the money be applied to the judgment in favor of Mrs. Simmons.

Judgment reversed, and judgment for appellant.

GUICE, Admr., appellant, v. SELLERS *et ux.*

(43 Miss. 58.)

Promissory note—purchase-money for sale of land. Evidence. Judgment, form of.

In an action on a promissory note given for the purchase-money for the conveyance of land with covenants of warranty, evidence of the grantor's want of title is inadmissible, there being no suggestion of fraud, of eviction, or of insolvency. The grantee must rely upon the covenants in his deed.

A judgment against an administrator in the form that "plaintiffs have and recover from the defendant's administrator" the sum adjudged, is sufficient, although the better mode would be to have added the words, "to be levied of the goods and chattels of his intestate, in his hands to be administered."

ACTION on a promissory note by Sellers and wife against Guice, administrator of Nathaniel Kinnison, deceased. The note was given for the purchase-money for the conveyance of lands, with covenants of general warranty. The case is sufficiently stated in the opinion.

T. Reed, for appellant, cited *Lake v. Manford*, 4 S. & M. 312; *Phillips v. Burns*, 13 S. & M. 31; 1 Story's Eq. §§ 191 to 197; *Breckinridge v. Mellon*, 1 How. 273; 4 id. 31; 2 S. & M. 541; *Barringer v. Boyd*, 27 Miss. 473; *Tillinghast's Forms*, 190; *Toller on Exrs.* 463.

Harris & Withers, for appellee, cited *Winstead v. Davis*, 40 Miss. 785.

SIMRALL, J. The plaintiff in error was sued on a promissory note by Sellers and wife, and gave notice that under the general issue testimony would be offered to prove that Mrs. Sellers sold and conveyed her dower, interest or title to defendant's intestate; that she had no title to the lands, nor any dower, title or interest, and that therefore the note was void. The defendant offered in evidence the deed of Mrs. Sellers (then widow Kinnison) to the intestate, which deed contained general covenants of warranty, and proposed to prove that in point of fact Mrs. Sellers had no title to the lands as doweress; and the court below excluded all the proposed evidence from the jury.

And that is assigned as one of the errors of the circuit court.

The entire defense proposed to be made is disclosed in the notice with the plea. The evidence offered covers the same ground.

It is not pretended that the intestate, who purchased from Mrs. Sellers, did not know the nature of her title, or that he was induced by her fraudulent misrepresentations to make the purchase.

The deed offered in evidence is a conveyance of all the right, title and interest of the grantor. For all that appears, the grantor was about to assert her claim to the lands, and the deed was accepted and the notes made to quiet the title of the vendee in possession, and to avoid the expense and risk of litigation.

If the intestate purchased with knowledge of the vendor's title, of whatever imperfections and infirmities pertained to it, he must rely on the covenants of the deed for his protection, there being no suggestion of a threatened disturbance of his possession, nor of insolvency. Although the acknowledgment of the deed is defective, yet the deed having been signed, sealed and delivered during her widowhood, whilst she was sole owner, is a perfectly valid conveyance.

The acknowledgment imparts no validity to the indenture, as a deed. It is one of the conditions precedent to its registration. Registration only gives notice to subsequent purchasers and creditors.

In *Vick v. Percy*, 7 S. & M. 288, a bill was filed to rescind, on the ground of "fraud in concealment of the aspect of the title," and "insolvency of the vendor's estate." The answer denied these averments. The court laid down "the principle as fully established, that in cases free from fraud a purchaser of land in possession cannot have relief in chancery against his contract to pay, on mere ground of defect of title, without previous eviction."

If "fraud and imposition" be practiced on the vendee, it may be reason to rescind; for fraud vitiates everything. *Anderson v. Lincoln*, 5 Howard, 284. Defect of title, without eviction when the vendee was in possession, of itself, is no ground to relieve against the purchase-money. *Bumpas v. Platner*, 1 John. Ch. Rep. 213; *Abbott v. Allen*, 2 John. Ch. Rep. 519.

Again, in *Gilpin v. Smith*, 11 S. & M. 129, "If the sale was not fraudulent, and there has been no eviction, the vendee must rely on the covenant in his deed. The current of decision is found uniform in our books of reports, finding its last iteration in the case of *Winstead v. Davis*, 40 Miss. 786, which was an action at law on the notes for the purchase money.

 Friedlander v. Pugh, Slocomb & Co.

2. The second error assigned is that the judgment is informal and insufficient.

It has been the doctrine of this court since the case of *Breckinridge, Admr., v. Mellon, admr.*, 1 How. 274, that if the judgment is against the defendant generally, when it should be against him in his representative capacity, it is error. But in this case the judgment is that the plaintiffs have and recover from the defendant, John G. Guice, administrator of the estate of N. Kinnison, deceased, said sum of \$1,337.50.

Guice was sued as administrator, and the recovery was against him in that capacity. Execution *de bonis propria* could not emanate on this judgment. It would have followed the "line of safe precedent," and we would by no means encourage a departure from it, to have added, "To be levied of the goods and chattels of his intestate, N. Kinnison, in his hands to be administered," etc. But the judgment being against him as administrator, necessarily on such judgment, the execution must go out against him as administrator, and be satisfied of the goods of his intestate.

Let the judgment be affirmed.

FRIEDLANDER, appellant, v. PUGH, SLOCOMB & Co.

(43 Miss. 111.)

Breach of contract — part performance — measure of damages.

In an action for damages on a contract which plaintiff was prevented from completing through the fault of defendant, the measure of damages is, not the price agreed to be paid in full performance, but recompense for the part performed, together with indemnity for the loss to plaintiff in respect to the part unperformed.

ACTION on contract. The opinion states the case.

Garrett Andrews, Jr., for appellant, cited *Pritchard v. Martin*, 27 Miss. 305-310; *Chamberlain v. McAllister*, 6 Davis, Ky. R. 352; *Caldwell v. Reed*, Littell's Select Cases; *Durkee v. Mott*, 8 Barb. 423; *Jones v. Van Patton*, 3 Ind. 107; *Shannon v. Comstock*, 21 Wend. 427; *Hackshaw v. McCrear*, 24 Wend. 304-9; *Clark v. Mur*

Friedlander v. Pugh, Slocomb & Co.

siglia, 1 Denio, 317; *Wilson v. Martin*, id. 602; *Spencer v. Halstead*, id. 606; *Boardman v. Keeler*, 21 Vermont, 78-84, 1 Gilm. 562; *Miller v. Mariners' Church*, 17 Greenleaf, 51-55, 56; Smith's Leading Cases, 441; Sedgwick on Damages, 219, 220, 221. See, also, *Hadley v. Baxendale*, 9 Excheq. 341; *Meade v. Rutledge*, 11 Texas, 44; 4 Cal. 392; 6 id. 19; Powell on Ev. 215. See also, Chit. Pl. 321, 326.

Wilkinson & Bowman, for appellee.

SIMRALL, J. This was a suit brought by attachment in the circuit court of Yazoo county by Pugh, Slocomb & Co., against Friedlander, founded on a verbal contract, by which, as is alleged, Pugh, Slocomb & Co. agreed, as auctioneers, to sell at auction for Friedlander, merchandise to the value of \$20,000, for which they were to be paid 5 per cent on the amount of the goods, making the sum of \$1,000; that they were ready and willing, and offered to perform their part of the contract, but were prevented by Friedlander, who declined to let the sale be made.

The attachment was levied on personal effects, which were replevied. There was also service of summons on Friedlander. The cause was submitted to a jury on the issue of *non assumpsit*, who found a verdict for the plaintiff below, and assessed damages, at \$335.

Motion was made by Friedlander for a new trial, which was overruled—exception taken embodying the testimony—and the case is brought here by writ of error. The testimony shows that Friedlander, proposing to close his mercantile business in Yazoo city, and remove elsewhere, applied to Pugh, Slocomb & Co., who were auctioneers, to sell out his entire stock of merchandise, for which he was to pay a commission of 5 per cent on the amount and value of the stock; the sale was advertised by posting notice at several public places, offering \$20,000 worth of goods for sale, on the day named. Friedlander did not represent or state to the auctioneers that his stock was worth that sum of money, or any definite sum. The goods were to be sold in the storehouse of Friedlander, and sale to continue from day to day until finished. Johnson and Pugh, two of plaintiffs, contend that there was no condition that Friedlander might not withdraw his goods from auction, if he chose so to do, nor was there any understanding that he might not sell goods at

Friedlander v. Pugh, Slocomb & Co.

private sale. When Friedlander stopped the sale, goods to the amount of between \$500 and \$550 had been sold.

Friedlander testified that he was to pay Pugh, Slocomb & Co., 5 per cent on the amount of sales; that he continued, with knowledge of Pugh, Slocomb & Co., to sell at private sale, and finding his goods at auction going off at ruinous prices and great sacrifice, he, for that reason, stopped the sale, and, four or five days after, his goods were seized under the attachment; that his stock was worth between \$8,000 and \$9,000, at the time of the auction. W. C. Diles, clerk of Friedlander, took inventory of the stock shortly before the sale, which amounted to \$8,000 or \$9,000.

Johnson stated the additional fact, that Pugh, Slocomb & Co. have been in the habit of permitting parties who had goods with them for sale to withdraw them before sale, and they did no service about said sale, except crying the goods, and keeping a list of articles sold. The sale was confined to heavy goods, remnants, etc.

The errors assigned are, that the verdict is contrary to the law and evidence. The damages are excessive. The court erred in refusing the second request for instructions by the defendant.

To determine the question whether the damages are excessive, and whether the verdict ought to have been set aside, and a new trial awarded, depends on the proposition whether the court below erred in refusing to charge the jury as requested by the plaintiff in error, and whether such refusal may have operated to his prejudice. The suit was *ex contractu*, and sought compensation in damages for a breach of contract.

The general rule seems to be that for non-performance of contract, where the damages are unliquidated, incapable by arithmetical calculation of being reduced to certainty, the criterion is, *quantum meruit* or *quantum valebat*, as the case may be. The end of the law is to furnish full and adequate satisfaction for the injury sustained by consequence of the breach.

The instruction which was refused is to the effect "that, if there was a certain and specific contract, and that the plaintiffs were prevented from fully performing their part of it by the defendant, then plaintiffs can recover the value of services which they actually rendered, and any specific damages which they prove they actually sustained by reason of defendant's refusal to let them complete their contract, and no more." The testimony shows that there had been a partial sale of the goods, a part performance of the contract, and

Friedlander v. Pugh, Slocomb & Co.

a willingness and offer to go on and fully execute it by a sale of the entire stock, which was prevented by the plaintiff in error.

We are of the opinion that the instruction asked had a direct application to the state of facts before the jury, and that it substantially embraced the rule that ought to have guided in assessing the damages, and that its refusal may have prejudiced the plaintiff in error. We take the rule, as settled by the better considered cases, and resting on the soundest reasoning, to be this: When there has been part performance of the contract, the just claims of the party employed to do the labor or service are satisfied when he is recompensed for the part performed, and indemnified for his loss in respect to the part unexecuted. By no means, as contended for by the counsel for the defendant, is it a sound doctrine of law or of morals, that when one party is hindered and prevented by the other from a performance of the contract, that the one in default can be fairly held to compensate in damages, in all circumstances, to the extent of the price agreed to be paid on full performance.

A. covenants to sell B. a parcel of land for a specific price, and executes and tenders a deed in compliance with his agreement, which B. refuses to accept; thereupon A. sells and conveys the land to C. for the same price, and immediately sues B. on his covenant. If an offer to perform were equivalent, on this point "of measure of damages," to a performance, then A. ought to recover the whole price which B. obligates himself to pay. If that were allowed, A. would realize double value for his land.

In *Clark v. Marsiglia*, 1 Denio, 318, an artist was engaged to clean and repair paintings. After doing part of the work, he was instructed by the employer to desist. It was held that damages should be allowed which would recompense for the labor done and materials used, and such further sum as might, on legal principles, be assessed for the breach. But the employe had no right, after he was ordered to desist, to go on with the work, and thereby make the penalty on the employer greater than it otherwise would have been.

In *Hickletter v. Mc Crea*, 24 Wend. 314, a merchant took up 330 tons freight room of a ship loading at Canton for New York, but furnished cargo for only 200 tons. After a failure to supply the full amount of cargo, and notification to the master of inability to do so, other parties offered freight, but at less price per ton. In settling the measure of responsibility to the ship-owner, it was held that the merchant was not liable for the freight on the 130 tons which he

failed to put on the vessel, at the price per ton agreed, there being no fraud or imposition in his conduct. But so much as the ship might have realized from other cargo, to supply the deficit, and which was refused, ought to have been estimated for the benefit of the ship-owners.

In *Miller v. Mariners' Church*, 7 Greenl. 51-56, the principle is very forcibly stated, thus: If the party entitled to the benefit of the contract can protect himself from loss arising from a breach, at a reasonable expense or with reasonable exertions, he fails in his duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party.

The principle is thus illustrated: A laborer is engaged to work for a month, he applies to perform, the hirer declines the service. The next day he is employed by somebody else, at equal wages. It is certain that one day covers the loss of time, and it would be unjust to allow him the entire month's wages for the breach of contract. Nor would the result be materially changed if employment were at hand, at fair prices, and he should refuse to avail of it. *Bukhojn v. Munn*, 2 Wend. 300; *Hauseau v. Thornhill*, 2 Blackf. 1078. On sale of commodities to be delivered *in futuro*, the extent of damages for non-delivery is the value of the commodities at the time of delivery.

An advantageous contract of resale made by the vendee, trusting to the vendor's promise to deliver the article, are considerations not to be estimated as too remote and contingent to affect the question of damages. *Clare v. Maynard*, 6 Adol. & Cress. 519; *Walker v. Moore*, 10 Barn. & Cress. 416; *Shepherd v. Hamp*, 3 Wheat. 200. In the case of *Masterson v. Mayor of Brooklyn*, 2 Hill, N. Y. 75, the contract was to deliver a large quantity of stone. Part was delivered, when an order was given to deliver no more. The New York court states the abstract rule to be, that so far as performance has been made, recovery should be had according to the terms of the contract. The party ready to perform should not suffer by the delinquency of the other party.

A case reported in 3 Ind. 107, the court commenting on a state of facts where a trader had engaged one Shultz to furnish a flatboat, equipments and men to transport produce to sundry points on the lower Mississippi, but after the boat was built the trader declined to prosecute the adventure—after declaring that the employe was not entitled to the sum to be paid for performance, lays down the

Friedlander v. Pugh, Slocomb & Co.

rule by which his claim was to be measured; that he ought to recover what would reasonably make him whole at the time of the breach; all the circumstances of the case being considered, perhaps the principle cannot be stated in language more precise and definite. *Pritchard v. Martin*, 27 Miss. 310, was the case of an overseer who had been turned off by his employer before his term of service had expired, without any or a sufficient cause. It was in evidence after his discharge that "the overseer used great exertion to get another situation—that being the business he followed—but could not get one, all being filled at that season of the year."

The court say the action may be brought immediately on the breach of the contract by employer, and the plaintiff may recover not only damages actually sustained previous to the commencement of the suit, but for such as may occur in consequence of, and after breach, and within the contemplation of the contract.

Reluctant as we are to disturb the verdict of the jury, especially in cases where the damages are unliquidated, and incapable of nice and accurate ascertainment, and declining to do so in those cases where substantial justice has been done on the facts, although erroneous instructions may have been given by the court, yet, where the verdict may rest on an improper basis, and that basis has been in anywise the fault of the court in misleading them, or in declining to give them correct rules to guide them, it is the duty of the revising court to set aside the verdict.

Two of the plaintiffs below, in their testimony, say they were to be paid commissions on the stock of goods. The defendant deposed that, by the contract, the commissions were to be on the sales. Shortly before the auction, the clerk of Friedlander took account of stock; the inventory was between eight and nine thousand dollars. Private sales, with the acquiescence of the defendants in error, were continued through the action. Friedlander says the goods were withdrawn from auction to prevent sacrifice. Moreover, the defendants in error sued out their attachment and levied, before making a demand on Friedlander for payment of their claim, or informing him of the amount. The habit and custom of these auctioneers was to allow their customers to withdraw merchandise left with them for sale. It does not appear that there was either bad faith, deceit or imposition practiced by Friedlander. No other service was rendered except to cry the goods and note the sales.

The jury may have allowed the defendants in error compensation

Parker v. Foy and Florer.

at the contract rate, and as if there had been full execution of the contract. This, as we have seen, is not, in this class of cases, the proper criterion. For the error of the circuit court in refusing the second instruction requested by the plaintiff in error, the verdict and judgment is set aside, and a *venire facias* awarded.

Judgment reversed, and cause remanded.

PARKER, appellant, v. FOY and FLOREN.

(43 Miss. 360.)

Deed. Lien of vendor of land. Notice to sub-vendee of land.

A recital in a deed of land that the consideration has been paid, is only *prima facie* evidence of payment.

A sub-vendee taking the legal title to land, charged with a vendor's lien, and with notice, accepts the title *cum onere*, and is in no better position than the original purchaser; and whatever is enough to excite attention or put such sub-vendee on inquiry is notice.

BILL in chancery. The opinion states the case.

Harris & Withers, for appellant, cited 2 Story's Eq. Jur. § 1502; *Leading Cases in Equity*, Hare & Wallace, vol. 2, p. 1, note to *Lenere v. Lenere*, p. 116; *Pendleton v. Gray*, 2 Paige, 202; *Segouney v. Mann*, 7 Conn. 324; 2 id. 186; 3 id. 146; 4 Cow. 717; 1 McLean, 110, and cases cited; 1 Wheat. 269; 7 Watts, 385; 2 Green's Ch. 143; 3 Gill. 468.

Johnston & Johnston, for appellees, cited 1 Greenl. Ev. §§ 22, 23; *Raley v. Greenleaf*, 7 Wheat. 46; 4 Kent's Com. 180; *Kilcrease v. Lum et ux.*, 36 Miss. 569.

SIMBALL, J. John Parker exhibited his bill in the chancery court against Foy and Florer, in which he states that on the 2d of September, 1858, he sold and conveyed to Foy a certain tract of land; that on the same day Foy made and delivered to him his five several promissory notes for \$1,200, payable annually, from the 1st of January, 1859, respectively. All of the notes, except the last one, maturing the 1st of January, 1864, have been paid; that

Parker v. Foy and Florer.

on the — day of —, A. D. 1865, Foy sold and conveyed this land to Florer; that Florer had notice that the note due 1st of January, 1864, was unpaid, and was for part of the purchase-money due from his vendor to Parker. *Pro confesso* was taken against Foy. Florer answered, denying notice of the existence of the note, or that any part of the purchase-money was due from Foy to Parker, claiming protection as an innocent purchaser, for valuable consideration, without knowledge of the claim and equity of Parker. On final hearing, on the pleadings and evidence, a decree was rendered against Foy for the amount found due on his last installment of the purchase-money represented by his note to Parker, and the land was subjected for the sum of \$600 in favor of Parker as against Florer. From this decree Parker has appealed, and Florer also has prosecuted a cross appeal, both of which have been submitted to us as one case.

It is insisted in this court for Parker that the decree against Florer is, under the law and facts, for too small an amount; and it is insisted for Florer that there is no lien on the lands in favor of Parker, and that the bill ought, as to him, to have been dismissed, he being an innocent purchaser without notice.

The proposition was pressed by the counsel for Florer in the argument at the bar, that inasmuch as the deed from Parker to Foy recited that the consideration had been paid, etc., that such recital operated as an estoppel upon Parker. And in support of this, 1 Greenl. Ev., § 21, p. 23, was referred to. In a note appended to section 26, page 33, there is a very full collection of American cases, "which treat this recital in the deed as only *prima facie* evidence of payment." Such is the rule in the New England States, in New York, Pennsylvania, Maryland, Virginia, Tennessee, Kentucky and South Carolina; North Carolina seems to be the only exception. In Louisiana it is regulated by positive law. The defense of innocent purchaser is only complete, by avering and showing that the consideration was valuable, that it was *bona fide* paid. It is not enough to show that it was secured to be paid. *Moon v. Mahon*, 1 Ch. Ca. 34; *Day v. Arnold*, Hard. 310; *Hardington v. Nichols*, 3 Atk. 304; *Maloney v. Kenman*, 2 D. & W. 31; 3 Atk. 814.

If the purchaser had notice before execution of the deed, or payment of the purchase-money, he will be bound by it. *Lady Rodman v. Vandearly*, 1 Ver. 179; *Jones v. Thomas*, 3 P. Williams, 243; *Strong v. Lord Winsor*, 3 Atk. 630.

In order to the protection, the purchase must be complete before notice of the prior equity. To make it complete, there must be on the one side an execution of the conveyance, and on the other a payment of the whole of the purchase-money, and the protection will be denied if the notice be given before the transaction is complete in either particular. *Simmons v. Richardson*, 2 Litt. 220; *Nantz v. McPherson*, 7 Munf. 599; *Pillow v. Shannon*, 3 Yer. 308; *Bush v. Bush*, 3 Strob. Equity, 301; *Barrett v. Nosworthy*, 2 Lead. Cases in Equity, 90, *et seq.* and cases cited.

If the sub-vendee has notice of the lien in favor of the original vendor, before he receives a deed and acquires the legal title, then the lien attaches to the land, and it may be subjected to the payment of the original purchase-money; subject, however, to a superior equity in favor of the sub-vendee to be reimbursed the purchase-money paid, which will be treated as a lien paramount to the original vendor's equity. If the notice is not received until after the deed has been executed, then the land is only bound in the hands of the sub-vendee for the amount of the purchase-money due from the sub-vendee to his vendor at the time of receipt of the notice. All payments made before notice were innocently made, and as to them, the sub-purchaser is entitled to protection. Payments made after notice, however, were paid in the party's own wrong, with knowledge of the prior outstanding equity. A sub-vendee taking the legal title to land, charged with a vendor's lien, and with notice, accepts the title *cum onere*, and is in no better position than the original purchaser, as against whom the lien was raised or implied. His condition is no better than if the lien were express, and registered in the proper office for recording such papers.

2d. As to the character of the notice, the principle seems to be pretty well established by authority, that whatever is enough to excite attention or put the party on inquiry, is notice of everything to which the inquiry might have led. Sufficient information to lead to a fact shall be deemed sufficient to charge a party with knowledge of it. *Kennedy v. Green*, 3 My. & K. R. 719; *Ploughboy*, 1 Gall. 41; *Hinde v. Vattier*, 1 McLain, 128; *Carr v. Hilton*, 1 Curtis, C. C. 393; *Wailles v. Cooper*, 24 Miss. 228.

In this last case the court say, "that if the title deeds under which a purchaser derives title recite an encumbrance, he will be bound by that recital, and presumed to have had notice of it whether he read it or not." The encumbrance referred to was a

Parker v. Foy & Florer.

mortgage which was not recorded at the date of the purchase. The court say in reference to verbal notice, "that a party may, perhaps, disregard a mere floating rumor, circulated by irresponsible persons." From a careful examination of the testimony, we are satisfied that Florer had direct and positive information that part of the purchase-money to Parker was unpaid.

Leachman, who was the attorney for Florer to examine the title, deposes that a written memorandum of the sale was entered into between Parker and Foy, at which time from \$300 to \$500 was paid by Foy. About two or three weeks afterward the deed was executed. Leachman, before the deed was executed, asked Foy if he had paid off the purchase-money for the lands. Foy replied he still owed five or six hundred dollars, which he had arranged with Parker, or would pay out of the money coming from Florer. Witness thinks Florer was present. Whitaker swears that Florer admitted that he had notice from Foy that there was a balance of \$800 due Parker, and that this notice came to him before he paid for the land. The notice to Florer was sufficient to put him on inquiry. There could have been no difficulty in applying to the right person and being correctly informed of the amount of the vendor's lien. He does not appear to have taken any pains to obtain correct and reliable knowledge. After this information, he paid the residue of his purchase-money to Foy. He failed even to see to it that the \$800 which he was informed was due to Parker was retained or applied as a credit on Parker's claim. He may have been misled and deceived by Foy, who said he would provide for what was due to Parker. But from the moment he had such information as would put a man of ordinary prudence and care on investigation—information not derived from vague and loose "rumor," but from persons connected with the transaction—he is chargeable with knowledge of the truth to which he could have attained. That truth would have been that the last installment of \$1,200 was still unpaid to Parker. In these circumstances the lien of the vendor attached to the land to the extent of the unpaid purchase-money owing from him to Foy.

But inasmuch as the record does not show the exact amount due at the time he had notice, and as the true balance may, with reasonable certainty, be ascertained, we reverse the decree, and remand, with instructions to the court below to ascertain what amount was paid to Foy by Florer at the date of his purchase and

Mangum v. Ball.

before notice of the claim of Parker, and to deduct ~~that~~^{the} sum from the whole amount of the sum to be paid by Florer to Foy, and for such balance decree against Florer and the land, etc.

Decree reversed.

MANGUM, Administrator, appellant, v. BALL.

(43 Miss. 293.)

Promissory note. Confederate money. Principal and agent. Set-off.

A. executed his promissory note to B., in 1861, payable in United States currency. In 1862, A. gave B. certain claims, also payable in United States currency, for collection, directing him "to exercise his discretion as to procedure to be taken in enforcing collection." B. accepted payment of the claims in Confederate currency. In an action against A., on the note, brought in 1868, by the administrator of B., *held*, that the full amount of the collected claims in United States currency, was a valid set-off.

ACTION on a promissory note, of which the following is a copy:

"(\$1,500.)

"MEMPHIS, TENN., March 23, 1861.

One day after date I promise to pay to the order of W. S. Ball, fifteen hundred dollars, value received, at one per cent per month interest.

"(Signed,)

"D. M. BALL."

Defendant pleaded usury and payment, and gave notice of set-off, consisting of notes, drafts, etc., of defendant, left with plaintiff's intestate for collection, amounting in the aggregate to \$2,100.67, submitting with the notice a "bill of particulars," setting forth a full description of each claim, against whom, date of collection, etc. Plaintiff, by replication, remitted the excess of interest and joined issue on the plea of payment. The cause was tried at the May term of the Yazoo circuit court, 1868.

Plaintiff having read to the jury the note sued on, rested his case; when defendant proved that through his agent, W. A. Edmunds, brother-in-law to W. S. Ball and D. M. Ball, as well as to plaintiff, he placed in the hands of plaintiff's intestate, in 1861-2, a large amount of claims for collection; that W. S. Ball, the intestate, was to "exercise his discretion as to procedure to be taken in enforcing collection;" that the proceeds of collections ~~were to be~~ first applied to the payment of a debt due from defendant to W.

Mangum v. Ball.

S. Ball; the surplus, if any, to be held subject to the order of defendant.

By the debtors themselves, defendant proved the payment in 1863, of these claims by them in Confederate currency, to plaintiff's intestate, to amount of \$2,100.87, and the surrender to the makers of the notes and drafts therefor. The plaintiff then proved by Mrs. Mangum, wife of plaintiff, formerly wife of plaintiff's intestate, that in December, 1865, or January, 1866, defendant offered to pay her the note sued on in "greenbacks," saying it was the only debt he owed, and not claiming set-off, nor in any way alluding to the said claims and collections. This offer to pay was confirmed by a brother of Mrs. Mangum.

It appeared that no instructions were given, nor was anything said as to currency in which the claims were to be collected; that defendant lived in Kentucky, and plaintiff's intestate, lived a part of the time in Tennessee, part of the time in Mississippi, and awhile in Alabama; that intercourse between the brothers was interrupted by the war, and that during that time there was no other than Confederate currency in general use within the Confederate States. The court instructed the jury, at the request of the respective parties, as follows, to wit:

For the plaintiff,

1st. Unless the jury believe from the evidence that the note sued on was paid, they must find for the plaintiff, the amount of said note.

2d. The burden of proof is on the defendant to satisfy the jury by the evidence that the note sued on is paid, and unless the jury are so satisfied, they must find for the plaintiff, the amount sued for.

3d. If defendant placed in the hands of W. S. Ball sundry claims for collection, as his agent, and gave no instructions as to the kind of currency in which to collect, and knew at the time that Confederate money was the general or only money then paying debts in the vicinity of the debtors, and said Ball collected the claims in said currency in good faith, and that he was instructed to hold the money when collected subject to the order of said defendant, and did so hold the money, and it was lost or perished without any fault or neglect of his, then the jury will find for plaintiff.

4th. If defendant requested W. S. Ball to collect the claims mentioned, as his agent, and contemplated the collection in Confederate

currency, and they were so collected for him, then W. S. Ball was not liable therefor, if he used the money, beyond its real value, in payment of the debt sued on.

For defendant,

1st. If the jury believe from the evidence that the defendants placed in the hands of W. S. Ball, in his lifetime, sundry claims for collection, and he did collect them and failed to pay the amount thus collected over to defendant, his estate is properly chargeable with the amount, and it must be allowed as a set-off to the note sued on.

2d. The plaintiff is entitled to no abatement for the value of Confederate money; provided, the jury believe his intestate received it at par in payment of notes and drafts collected by him without instruction from defendant to do so.

Thereupon the jury found a verdict for defendant for \$97.94. The plaintiff moved for a new trial, which, being overruled, he excepted, and brought this writ of error.

Hudson & Nye, for appellant, cited 2 S. & M. 638; 7 id. 24; 8 id. 324; id. 643; 12 id. 604; 1 How. 19; 29 Miss. 17; 38 Miss. 348 35 id. 506; *McLaughlin v. Simpson*, 3 S. & P., Ala. 85; 2 Parsons on Cont. 465-467; Livermore on Agency, 28; 4 Tenn. 177; 4 Esp. 144; Cowp. 479; 1 Campb. N. P. 523; 7 East. 38; 1 T. R. 22; 1 Parsons on Cont. 54, 55, 56; 11 Wend. 477; 3 P. Williams, 279; 4 Queen's B. 235; Story on Agency, § 265; also, 2 Parsons on Cont. 465-468; *Craig v. State of Missouri*, 4 Pet. 410; 7 How. 340; 7 id. cited above; 40 Miss. 530; 14 How. S. C. R. 38; 20 Curtis 24; *Overall v. Wright*, 2 Caldwell Tenn. 3; id. 20; id. 295; id. 419; id. 468, 472; 3 Head, 297-723; 6 Bing. 174; 10 id. 110; *Orchard v. Hughes*. 1 Wallace S. C. R.; Livermore on Agency, 148, 149; 1 Cowp. 479; 5 Days, 556; 2 T. R. 188; 2 Kent's Com., 8th ed. 802; 1 Cushman, 248; 2 Kent's Com., 7th ed., 809, 2d paragraph; see *Williams v. The State*, 12 S. & M. 58; 1 Nott & McCord, 9; 12 Wend. 547; 2 Leach, 1036; 2 Com. Law, 269.

Miles & Epperson, for appellee.

TARBELL, J. (after stating the facts.) The following causes are assigned for error:

1st. The verdict of the jury was contrary to the evidence and the law.

Mangum v. Ball.

2d. The court erred in granting the instructions asked for defendant.

3d. The verdict of the jury was excessive, and for any balance against plaintiff is illegal and unjust.

4th. The set-off of defendant should not have been allowed, or if allowed, only for the value of Confederate notes.

5th. The allowance by the jury of Confederate money at its nominal amount, both by way of payment of the note sued on by plaintiff, and for a balance after such alleged payment at its nominal amount, was erroneous, illegal and unjust.

Lengthy, earnest and ably written arguments, which we have carefully examined, have been submitted on both sides, wherein the various questions involved are forcibly discussed. From these arguments, from the evidence contained in the bill of exceptions, and from the instructions of the court to the jury, we are led to believe there was no relevant point untouched before the court and jury.

The case presents interesting questions, which have enlisted the liveliest attention of counsel. To the parties, the case is of course important, from the amount involved.

In our view, the solution of this case is found in the terms of the note sued on, and of the claims collected, and in the entire absence of instructions to the agent. 7 Wal. 447; 7 Hill, 128; 5 id. 399; 51 Barb. 90; 36 id. 349. We might, therefore, dispose of this cause in a few lines, but our duty would hardly be performed without at least a brief elucidation of our views of the questions presented.

Was the verdict contrary to the evidence? We think not.

The witnesses were few in number, and their testimony brief. As they were unimpeached, we presume they were unimpeachable. Their testimony was brief, uncontradicted, and, we presume, unquestionably truthful.

Mr. Edmunds, the brother-in-law of both the parties to this suit, and to the intestate state: "My present recollection and distinct impression is, that it was mutually agreed or understood between the two Balls, as fast as any collections could be made on said claims, such collections were to be applied to the payment of a certain indebtedness of D. M. Ball to W. S. Ball, for money loaned by W. S. Ball to D. M. Ball, * * * any residue of collections in hands of W. S. Ball, after the payment of D. M. Ball's

indebtedness to W. S. Ball, were subject to D. M. Ball's order or direction. Nothing was said or agreed as to kind of currency to be taken in payment of said claims. I think W. S. Ball was to exercise his discretion as to procedure to be taken in enforcing collection of said claims."

Mrs. Mangum, wife of plaintiff, and formerly of plaintiff's intestate, testified that in an interview with her in December, 1865, or January, 1866, defendant said "nothing to her about these claims; did not mention them to her; neither did he speak of W. S. Ball having collected any money for him." She further said: "I know W. S. Ball would not have received Confederate money in payment of the defendant's note now in suit; said note was given by defendant to W. S. Ball for borrowed money; the money that defendant received was in United States currency, and at that time considered equivalent to gold."

By the debtors themselves, defendant proved the collection, by plaintiff's intestate, of \$2,100.67, and the surrender to them of the evidences of their indebtedness to defendant in 1863. Payments made in Confederate notes. As to the testimony that defendant offered to pay the note sued on to Mrs. Mangum, in "greenbacks," this offer being declined, bound no one. It might have been made in ignorance of facts, or of his legal rights, or from some unexplained motive justifiable in itself. Not being accepted, his rights were unimpaired, subject to the opinion of the jury as to the effect of the offer in view of the evidence before them. The judgment of the jury is indicated by their verdict.

It is uncontradicted that, out of the first collections, the note sued on was to be paid. The jury gave effect to that understanding. It is equally uncontradicted that the surplus of collections, after paying the note sued on, was to be held by plaintiff's intestate, subject to the order of defendant. At the trial, the note and interest sued on amounted to about \$2,600, while the claims collected, with interest, amounted to about \$3,000—showing a balance due defendant of about \$400 in round numbers. The verdict being for \$97.94 *only*, it is evident the jury took into favorable consideration some of the facts or arguments suggested.

We are unable to discover any conflict of evidence, even; and clearly that the verdict was not against the preponderance of the testimony, but that it was in strict conformity to undisputed facts on both sides.

Mangum v. Ball.

On the facts, therefore, we see no occasion to interfere with the verdict of the jury, unless because the defendant was entitled to a larger judgment. This case is one, however, wherein the judgment of the jury ought not to be lightly disturbed. Losses growing out of the war, as in this case, involve equities within the peculiar province of the jury to adjust. That they have done it, in this instance, in strict conformity to the facts proved, and with due regard for the plaintiff's rights, it is due them to say.

Was the verdict against the law of the case? That defendant, in 1861 or 1862, placed in the hands of plaintiff's intestate, for collection, a large amount of notes and drafts, by their terms payable in United States currency; that in May, 1863, he collected these demands to the amount of \$2,100.67, in Confederate currency, surrendering the notes and drafts to the makers and drawers thereof; and that he had no instructions as to currency, we suppose to be undeniable facts. The witness, Edmunds, states that "W. S. Ball was to exercise his discretion as to procedure to be taken in enforcing collection of said claims." The jury evidently considered this "discretion as to procedure" to apply to the *mode and manner* of "enforcing collection," rather than to the currency to be received in payment; in which they were evidently right. For the purposes of these collections, W. S. Ball was constituted a limited, special agent for the performance of this particular duty. His power, authority and discretion were prescribed by the papers placed in his hands. These papers called for United States currency. Unauthorized by his principal, he had no right to surrender these claims, except on payment according to their terms. In accepting property, or Confederate currency as money, in discharge of these debts, he voluntarily assumed to respond to his principal for the full amount. As to any *presumption* of authority, or instructions, to receive Confederate currency, arising out of the condition of the country, as it is in accordance with both law and fact, the verdict of the jury may be accepted as final, this point being embraced for their consideration in the instructions of the court.

If the plaintiff's intestate was an attorney-at-law, which does not affirmatively appear by the record, the decisions are numerous and uniform in this State, that if he received these claims for collection, under a general retainer only, he had no right to receive in payment other than lawful currency. Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the

attorney is responsible for the damages occasioned by the loss. 5 Mass. 57; *Keller v. Scott*, 2 S. & M. 81; id. 514; 17 id. 24; 10 id. 36; 9 id. 249; 11 Johns. 464.

A sheriff, who in some degree stands in the relation of agent to the party for whom he collects money, has no right to receive depreciated paper money on execution in his hands.

Held to be not a satisfaction nor payment. 5 How. 246; 2 S. & M. 514.

If, as we suppose, plaintiff's intestate was a special agent for the collection of these claims only, the law is equally well settled. If he chose to accept property or Confederate currency to the amount of his note against defendant, it was altogether for his own consideration, and not a matter of any concern to defendant. Beyond that, it was his duty to conform to his instructions or his orders. Any material deviation from those instructions rendered the agent liable. Story on Con., § 369, and cases; 24 Vt. 85; 8 Cow. 198; Paley on Agency; Story on Agency; Parsons' Con.; Addison's Con.

He was not a general agent—nor a general collecting agent, such as is known in the larger commercial States and cities, with general powers, authority and discretion, but a special agent, limited by the terms of the notes and drafts he was employed to collect. *Ward v. Smith*, 7 Wall. 447, and cases; 13 Wend. 105; 7 Hill, 128; 5 id. 396; Story on Promissory Notes, § 115, and cases.

This author (§ 115) says, of the payee of a note: "He is also entitled to have it paid in the very money or currency in which it is made payable, and its value at the time of payment; and he is not bound to accept payment in any other manner. Thus, for example, he is entitled ordinarily to demand payment in gold and silver at its current value, or the standard value in the country where it is paid or payable; and he is not bound to receive it in bank notes or in any other paper currency." Of course he would now be bound to accept legal tender notes under the law of congress. "If the holder be a mere agent, he has no right to accept payment in gold, in lieu of money, unless, specially authorized so to do." Story on Promissory Notes, p. 389-400, and cases.

In *Ward v. Smith*, 7 Wallace, 447, the court held "that the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender," etc. In 18 John. 366, citing 1 Com. on Con. 240,

the court say: "An agent constituted for a particular purpose, and under a limited and circumscribed authority, cannot bind the principal by any act in which he exceeds his authority." *Vide*, also, 51 Barb. 90; 40 id. 648; 31 id. 196; 8 Ohio State, 1; 8 Wend. 494; 2 Nott & McCord, 489; 8 East, 251; 11 Johns. 464; 18 id. 363; 7 id. 132; 21 Wend. 610; 4 Vt. 47; Brayton Vt. 24; 19 Pickering, 55; 2 Hill, 190; 8 Wend. 494. The release of these claims by the agent on their payment in Confederate currency, accepted by him as money, renders him amenable to his principal in an action for money had and received, and these claims are, therefore, the subject of set-off. 51 Barb. 90; 11 Johns. 464; 4 Vt. 47; Brayton, 24; Chit. Pl. 351, and cases; 7 Johns. 132; 19 Pick. 55; Story on Agency, etc.

Counsel strenuously insist that defendant must resort to a special action for violation of instructions, negligence or fraud. It is true, most of the cases put by the writers on agency and contracts, from the facts of each, require a special action, but in this instance *assumpsit* for money had and received is the proper remedy. This form of action is as well defined, if not as old, as the common law itself. Beginning with the celebrated note of Mr. Day, to the case of *Marriott v. Hampton*, 2 Esp. 546, wherein he gives a collection of cases on the subject of money had and received, the line of demarkation has been clear and well defined to the present time. *Vide* 8 Cow. 198; 2 Burr, 1005; 1 Doug. 138; 5 Burr. 2589; 8 Bibb. 378; 11 Mass. 494; 4 Pick. 60-71; 11 Johns. 464; 6 Cow. 183; 5 Cow. 473; 16 Hall's Superior Court, 453; 5 Wend. 207; 18 Mass. 483; 12 id. 78; 5 Pick. 384; 7 id. 214; id. 220; 4 id. 59; 6 Mass. 182; 1 Johns. Ca. 205; 11 Johns. 460; 12 id. 276; 4 Day, 175; 17 Mass. 575; id. 400, etc. Where an attorney or agent has discharged a debt due to his principal, etc., an action for money had and received will lie. 11 Johns. 464. And property received as money will support this action the same as if money itself had been received. 7 Cow. 862. If one dispose of a note belonging to another, he is liable to the owner in an action for money had and received. 4 Vt. 47. If an agent entrusted with property to sell for money dispose of it, he is liable in this form of action, whether the sale be for money or not. Brayton, 24. The same doctrine is found in Ch. Pl.; Story on Agency, etc. There is no evidence in this case to show, or that tends to show, that defendant has *ratified* the acts of plaintiff's intestate as his agent in the collection of these claims, but the reverse.

It is in proof that these brothers met but once during the war; that in the interview between defendant and Mrs. Mangum, at the house of her brother, in December, 1855, or January, 1866, the subject of these collections was not referred to, directly or remotely. The only fact relied on by plaintiff in error to show ratification, is the presentation of these claims as a set-off in this suit. So far from sustaining the point made, it seems to us a repudiation of the acts of the agent, and a demand upon him, or his estate, to account for those claims or the proceeds in lawful currency. Story on Agency, § 235, and cases cited; 40 Barb. N. Y. 648-654; 2 Mass. 106; 8 Wend. 394; 17 Vt. 470.

A statement made by Mrs. Mangum, in her testimony, to the effect that she knew W. S. Ball would not have accepted Confederate currency in payment of the note sued on, for the reason that it was payable in gold or its equivalent, is one which should not be overlooked. It shows that the attention of plaintiff's intestate was directed to this subject of currency. If he would not accept Confederate currency in payment of his own note, why should he ask his principal, for whom he was collecting, to accept it? There is an old and familiar sentiment of the books, not inappropriate, that a man should at least observe as much care of another's property, of which he is only the voluntary and unpaid bailee, even as of his own. There is also another of a still higher dignity, that the engagement of a mandatary partakes of a trust, in the execution of which a strict fidelity is required. And again, the doctrine of the books as to deposits or bailments, also without recompense, is this: "If a direction accompanies the deposit, it must be complied with strictly, and any deviation from the instructions will render the bailee liable."

The learned Story says: "The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions; for if he unnecessarily exceed his commission or risk his principal's effects without authority, he renders himself responsible to the principal for the consequence of his act. If loss ensues, it furnishes no defense to him that he intended the benefit of his principal. The rule, that agents are responsible for damages arising from breach of orders, negligence or incompetence, admits of few or no exceptions in regard to agents who receive hire or reward for their service. Yet, independently of this consideration, the confidence induced by undertaking any service for another is a

Mangum v. Ball.

sufficient legal consideration to create a duty in the actual performance of it. Therefore, a gratuitous or voluntary agent, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound to exert such a portion of activity and care as may reasonably satisfy the trust reposed in him. If, therefore, a man does not choose to act upon the confidence appearing in the course of the transaction to be reposed in him, he should reject it as soon as proposed."

This statement of Mrs. M. also shows that the attention of plaintiff's intestate being directed to the subject of the currency, while he would exact gold or its equivalent in payment of his own debts, he was willing to accept a depreciated currency, depending upon the chance of war, in payment of claims held by him in a fiduciary capacity, as the agent of the one of whom he proposed to exact gold.

This evidence, no doubt, justly had its influence with the jury, so far as it detracts from those equities claimed for plaintiff's intestate, and which jurors will always entertain in adjusting cases of this kind. It is no answer to say that his orders were absolutely to collect, and that he was without instructions as to currency. The fact, nevertheless, stands out undeniably that his mind was directed to this matter, and that on his own debts he would not accept the depreciated currency of the Confederacy.

As to the suggestion of counsel, that the plaintiff's intestate was perhaps an agent without recompense, the point was not raised in the court below, and if it had been, there is nothing in it. In the absence of any understanding between the parties, the law supplies their neglect by implication, and plaintiff's intestate is an agent for hire, so far as the issues of this suit are concerned. 25 Com. Law Rep. 208; 2 Blackstone's Com. 443; 1 Parsons on Con. —; Addison on Con. § 3, p. 48; 15 Conn. 52; 28 Vt. 401; 4 Conn. 524; Ch. on Con. §§ 11, 12-14.

Taken altogether, we think the instructions presented this whole case to the jury, who evidently had all the questions not only fairly before them but under consideration. By their verdict they have rendered as even and impartial injustice as is possible in cases of this character.

Judgment affirmed.

GILLIAM, appellant, v. CHANCELLOR & MURRAY, Exrs.

(43 Miss. 437.)

Will. Marriage-settlement. Jurisdiction. Ademption.

A husband died leaving an unsatisfied ante-nuptial contract in favor of his wife, and a will declaring it to be his wish that his executors should "see that his contracts are fulfilled, and that his wife have a dowry" of a specified amount. The wife filed a bill in chancery to recover upon the marriage contract; also a petition in the probate court to recover the legacy. *Held* (1) that the court of chancery had jurisdiction to enjoin her from the further prosecution of the suit in the probate court, and (2) that parol evidence of the situation of the testator, the condition, character, etc., of his property, was admissible to ascertain his intention to adeem, the will not being explicit on this point, and, if such intention should be established, to ascertain whether the legacy should be taken as a satisfaction in full or *pro tanto*.

BILL in chancery. In March, 1864, Littlebury Gilliam and Mary A. Dennis entered into a contract of marriage stipulating that both parties should put certain funds into a partnership, and in case he should die before her, and a division of the joint property should not amount to five thousand dollars, the balance should be made up from his estate. In consideration of this agreement she, on her part, renounced all claim to dower, child's part, year's allowance, etc., to which she might be entitled under the statutes of Mississippi. The marriage was consummated; and in the latter part of the same year (1864) he died, leaving a will in which he declared it to be his wish "that J. S. Chancellor and B. Murray, administer his estate, and pay all of his just debts and see that his contracts are fulfilled, and that his wife, Mary Ann Gilliam, have a dowry of five thousand dollars in currency." In April, 1865, Mrs. Gilliam filed this bill in chancery to recover the five thousand dollars jointure upon the marriage contract. She also filed her petition in the probate court to recover the legacy. The executors in their answer to the bill alleged that the legacy was in satisfaction of the marriage contract, and prayed that the complainant be enjoined from prosecuting her suit in probate. The court decreed that the complainant recover five thousand dollars in United States currency, with interest from the time of the testator's death, and that the complainant be restrained perpetually from further prosecuting her

suit in probate for the recovery of the legacy. Complainant appealed.

C. D. & J. D. Fontaine, for appellant, argued that the court of chancery had no jurisdiction of the proceedings testamentary, and cited *Blanton v. King*, 2 How. 856; *Powell et al. v. Burnes*, 35 Miss. 615-16; *Carmichael v. Browder*, 3 How. 252; *Phipps v. Probate Judge*, 5 id. 68; *Ratliff v. Davis*, 38 Miss. 107; 1 Freeman's Ch. R. 136; Chilton's Probate Law and Practice, 8; *Vertner and Wife v. McMurrin, admr.* 1 Freeman's Ch. R. 149; *Green v. Creighton*, 10 S. & M. 159; also, *Hamberlin v. Terry*, 7 How. 147; *Jones et ux. v. Irwin's exrs.* 23 Miss. 364; 2 McCord's Ch. R. 26; 7 How. 143; 2 id. 806; Story's Eq. Pl. 4 ed. p. 9, § 30; *Brown v. Bank of Mississippi*, 31 Miss. 454; 2 Rob. Proc. 300, citing 1 Johns. Ch. R. 428; id. 297; 1 H. & M. 18; 4 id. 473; 3 Rand. 78; Leigh, 6; 4 Conn. 727; 2 Paige, 509; 4 Johns. 679; Mitford's Pl., 3d ed., p. 100; also Smede's Dig. 121; *Beney v. Turner*, Walker's R. 489; *Teer v. Moorer*, 1 Bailey's Ch. R. 62; 2 U. S. Eq. Dig., pp. 146 and 147, §§ 206, 207-209, 210, 211, 212-214, 215, 216-220, 221-225; *Underhill v. Van Courtlant*, Paige's Ch. R. 45, 46; 2 Johns. Ch. R. 339; *Henderson v. Mitchell*, 1 Bailey's Ch. R. p. 113; *Cable v. Martin*, 1 How. 558; *Davis v. Roberts*, 1 S. & M. Ch. R. 543; *Livingston v. Livingston*, 4 Johns. Ch. R. 287; *Osgood v. Brown*, 1 Freeman's Ch. R. 392; Rev. Code, p. 454, art. 118. The legacy was not in satisfaction of the marriage settlement; Foublanque's Equity (Lausatt's ed.), pp. 571-575, note c; Prob. Court Law and Pract. (Chilton) 182; 1 Green Ch. R. p. 1; 5 Cow. 368; 8 id. 246; Toller on Exrs. 337, 338; 2 Lomax on Exrs. 117-178, 179; 3 Murdock, 98; 4 Wend. 443; 12 id. 67-352; Tuck. Com., book 2, p. 446; 12 Mass. 391; 2 Hill, 567; 1 Devereaux Eq. 108; 6 Rand. 176. On the subject of parol evidence, counsel refer to the following authorities: Redfield on the Law of Wills, 540, § 2; *Love v. Buchanan*, 40 Miss. 758; 1 Johns. Ch. R. 233; 4 Mo. 780; *Fowler v. Fowler*, 3 P. Williams; *Fry v. Porter*, 1 Md. R. 300-310; *Eaton v. Benton*, 2 Hill, N. Y. 576; Toller on Exrs. 338-366; Matthews on Presumptive Ev. 107-118; *Cheney's Case* 1 P. Williams, 409, note 1; 1 Redfield on Wills, 540, 541, note 6; 3 Greenl. Ev., § 366, p. 338; 3 Cow. and Hill's; Phillips on Ev. 1384, 1385, 1386, 1387; 4 Kent, 9th ed. 539, 540. As to the legal definition of the word *currency*, see Bouvier's Law Dic. 358; Constitution U. S., § 10, art. 1, construed in *Craig v.*

 Gillan v. Chancellor & Murray.

State of Missouri, 4 Peters, 116; and especially *Mitchell v. Hewitt*, 5 S. & M. 361, and authorities cited in the opinion and in Peters' brief; and 40 Miss., *supra*.

J. A. Green, on same side, cited 2 How. 822; id. 850; 3 id. 252-258; 4 id. 458; 7 id. 143-162-201-316; and Freeman's Chancery Reports, 501; 2 Redfield on Wills, 215, *et seq.*; 2 Roper, 40; 2 P. Williams, 613; 1 Vesey, 298; 2 id. 463; Story's Equity, 1101, *et seq.*; 2 Roper, 1050; 3 Vesey, 516; 1 P. Williams, 408; 2 Story's Equity, 1122; 1 Vesey, 519; Williams on Executors, 805; 1 Vesey, 534; 3 id. 516; 6 id. 309; 15 id. 509; 2 Redfield, 543; 3 P. Williams, 313; 18 Vesey, 152; 1 Johns. Ch. R. 233; 5 Vesey, 85; Story's Equity, 1114; 1 Greenl. 296; *Love v. Buchanan*, 40 Miss. 758; see Wagram's Rules, 1 Redf. 502; 1 id. 438, 439.

Reuben Davis, for the appellees, on the matter of jurisdiction, cited *Fowler v. McCarthy*, 27 Miss. 516; Mitford's Ch. Pl. 36; also 1 How. R. 558; 4 Johns. Ch. R. 455; 1 Bailey's Eq. Rep. 187; Mitford's Pl. 100-135-173; 1 Vernon, 59; 1 Eden, 100; 2 Johns. Ch. R. 369; id. 463; 1 Vernon, 446; 4 Johns. Ch. R. 290; 1 McCord's Ch. 242; Walker's R. 307; 1 How. 558; *Trelawny v. Williams*, 2 Vernon Ch. 483. On the question of parol evidence, counsel cited *Ex parte Pye Duport*, 18 Vesey, 153; Gresley's Eq. Ev. 363; id. 367, note *t*; 1 Vesey, 108; 3 B. C. C. 62; 2 Vesey Jr. 465; Roberts on Wills, 453-455; 27 Miss. 630; Roberts on Wills, 442-461-466-471; 6 Vesey, Jr. 42; 1 id. 266-267; Roper on Legacies, by White, vol. 2, ch. 185; id., ch. 105 to 108; 2 Story Eq. § 1102 to 1112; Roberts on Wills, 420 to 426; 1 P. Williams, 323; J. C. 225; 2 Vernon Ch. 558; 3 Atk. 419; 2 Vesey, Jr. 409; 3 P. Williams, 227; 2 Vesey, Jr. 464; 2 Roper on Legacies, ch. 18-54, p. 95; Roberts on Wills, 437 to 442, 428; 2 Story Eq., § 1106, and 1102 to 1112; Paige Ch. R. 511; see also, 2 Vesey, Jr. 463; 3 id. 516, 528-9; 2 Story Eq. § 1109 to 1120; Gresley's Eq. Ev. 210, note 5; Maddock R. 360; 5 Vesey, 85; *Hinchcliffe v. Hinchcliffe*, 3 id. 516; *Pole v. Lord Summers*, 6 id. 309; also Gresley's Eq. Ev. 213; 2 Russ. & M. 269-300.

J. A. Orr, on the same side.

SIMBALL, J. Three important points are made by counsel: First, whether, as claimed for the plaintiff in error, the jurisdiction of the

Gilliam v. Chancellor & Murray.

probate court over the bequest to Mr. Gilliam is exclusive. Second, is the legacy a satisfaction or performance of the ante-nuptial settlement, so as to put Mrs. Gilliam to her election. Third, has she lost the benefit of the marriage settlement because the instrument is unstamped.

1st. The argument is, that Mrs. Gilliam had instituted a proceeding in the probate court, against the executors, to secure the legacy of \$5,000; a tribunal which had, to the exclusion of the chancery court, jurisdiction to order its payment, and it was therefore an usurpation in the chancery court to stay that suit by injunction, and to withdraw from it, to itself, the subject-matter in dispute.

It was declared in *Blanton v. King*, 2 How. 856, and *Carmichael v. Brown*, 3 How. 252, followed by a long train of subsequent adjudications, that the jurisdiction conferred by the constitution on the probate court was exclusive; so exclusive that the chancery court was ousted of cognizance over a large class of subjects which therefore belonged to it.

From 1832 to 1860, our books are full of cases attempting to define the boundary which separated the two courts. In truth, no subject has so much perplexed and embarrassed the appellate court as this. The chancery had unquestionably the cognizance of the rights of Mrs. Gilliam under the marriage contract, and would draw to itself all collateral subjects necessary and proper to be considered in order to a full, complete and final adjudication of those rights. If, therefore, it was, as contended by the executors, that the legacy was, an ademption of the portion provided by the ante-nuptial settlement, it would not be possible to settle the claims of Mrs. Gilliam under the settlement, without also ascertaining the extent to which, if at all, these would be modified or affected by the will. It would be altogether proper, in this aspect of the case, to stay the proceedings in the probate court until the points were canvassed in the chancery suit. Mrs. Gilliam insisted that she was entitled to the benefit of both legacy and marriage settlement. The executors, on the contrary, assert that the former was in performance or satisfaction of the latter. The powers and jurisdiction of the chancery court were broader, more pliant, and flexible in its modes of redress, fully competent in one litigation to adjudicate finally in respect to both the settlement and bequest, and could, therefore, well assume, as it did, entire cognizance over the subjects.

2d. Is Mrs. Gilliam entitled to the marriage contract and the legacy? Is the one an ademption in full or *pro tanto* of the other? The general presumption is against double portions. When the object appears to be to make a provision, and that object has been effected in one instrument, it should not be suspected that a like provision, in a second instrument, was intended as a repetition of the first. If the benefit to the donee be different in species, the presumption of satisfaction will not arise. Powell on Devises, 433, note 4. It may be rebutted by the acts and declarations of the testator. 2 Story Eq., § 1102. To make this presumption arise, the thing substituted should not be less beneficial, either in amount, certainty of time of enjoyment, or value, than the thing due or contracted for. 1 Vesey, 521. In cases of *satisfaction*, the presumption will not hold, when the thing is less valuable than the thing contracted for, since satisfaction implies the doing of something equivalent, and the presumption is much weakened when the thing substituted is not equivalent to the thing contracted for. If the thing done can be considered as a *part performance* of the thing contracted for, it shall be so taken.

In *Litchman v. Earl of Carlisle*, 3 P. Williams, 211, there was a covenant to settle lands of a certain value; a subsequent purchase of lands of a *smaller* value, which were at the covenantor's death undisposed of, and which went by descent to the covenantee, shall be intended as a part performance, as it may be presumed he intended to purchase more lands afterward, and settle the whole according to the covenant.

In *Blandy v. Widmore*, 1 P. Williams, 423, the agreement was, if B., the intended wife, should survive A., her intended husband, A. should leave B. £620, and A. accordingly covenanted with B.'s trustees that his executors, within three months after his decease, should pay B. £620, if she should survive him. A. died intestate, upon which B., the wife, by the statute of distribution, became entitled to a moiety of the personal estate, which was much more than the £620.

The lord chancellor said he would not take this covenant as broken; the agreement was to leave the widow £620; she gets, as distributee, much more than that, which shall be accounted as satisfaction of, and including in it, her demand, by virtue of the covenant.

In *Wilcox v. Wilcox*, 2 Ver. 638, a father covenanted to settle

Gilliam v. Chancellor & Murray.

an estate of £100 per annum, on his eldest son, and left lands of the value of £100 per annum, to descend upon his son. This was held to be a satisfaction of the covenant to make the settlement.

Goldsmidt v. Goldsmidt, 1 Swann, 216, was very carefully considered. By articles of agreement made in contemplation of marriage, Abraham Goldsmidt covenanted that, in case he should die in the lifetime of his wife, his executors or administrators, should, within three months next after his decease, pay to Martha Goldsmidt, her executors, etc., £3,000. The will authorized the executors to divide the property, of all kinds and descriptions, in such ways, shares and proportions as to them should appear right. The executors never made division, and it was agreed that the estate fell for its disposition under the statute of distributions.

The master of the rolls declared the rule to be settled that the distributive share of the widow, in case of absolute intestacy, is considered as performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. The question is at rest. These marriage settlements do not stand on the footing of ordinary debts. During the life of the husband there is no breach of the covenant—no debt. The case reposes on the ground that the widow has received, under the statute, what was stipulated to be paid her in the articles. It is a question of performance if the distributive portion equals or exceeds the amount secured to her by the articles. In cases of tenacy, the question is one, nakedly, of intention, on the part of the testator, that the legacy shall be in lieu or satisfaction of the covenant. The rule was said by the equity judge in this case to have been established for a hundred years. Subsequent to this, Lord ELDON, in *Guthshore v. Charlie*, 10 Vesey, Jr., went into the cases, and considered the principle as put at rest by the authorities.

In a late case, reported in 5 Mylne & Craig, 29, Lord COTTENHAM said all the decisions upon questions of double portions depend on the declared or presumed intentions of the donor. The presumption in equity is against double portions, because it is not thought probable, when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in another should be intended as an addition to the first. It was also held in this case that the fact of whether the

provision of the will was a performance or satisfaction of an antecedent covenant to provide a portion, or whether it was a gift, might be proved by internal evidence furnished by the will.

In *Lloyd v. Harvey*, 2 Rus. & Mylne, 310 (13 Eng. Ch. 51), it was ruled by the master of the rolls that parol testimony (which in that case were the declarations of the testator in his last illness) was admissible for the purpose of showing whether the legacy was the bestowment of a gift or the adoption of the covenant.

Sir JAMES WIGRAM, vice-chancellor, an equity judge of great learning, and accustomed to much study and investigation, in forming his judgment in *Kirk v. Eddowes*, 3 Hare, 509, on a review of the cases, came to the conclusion that parol evidence was to be received, not for the purpose of affecting the will or its construction in any sense, but to establish an independent fact whether the one portion was in substitution of another. If the provisions were made by separate instruments, parol evidence was not admissible upon any question of the construction of either, or to show that the instruments were made for any other or different purpose from that expressed in the writing. If admissible to prove an ademption, it is to be received also on the other side. The testimony is not admitted on either side for the purpose of proving, in the first instance, with what intent either writing was made, but only to ascertain whether the presumption which the law has raised be well or ill founded.

Mr. Roper, in his valuable treatise on Legacies, 1 Rep. 346, 409, thus sums up the result of the cases: "The law may be considered as settled that declarations made by the testator, to any person, at any time, whether as part of the transaction or not, are admissible in evidence on the question of ademption."

In *Hull v. Hill*, 1 D. & Walk. 94-111-133, Sir EDWARD SUGDEN, chancellor, made a most elaborate review of this subject. The cases examined by him were attempted to be classified by Mr. Redfield thus: "1st. When the legacy is claimed to have been adeemed by the father, or one standing *loco parentis*, parol evidence may be received in aid of the construction to the same extent as in other cases. 2d. Where the presumption of law is according to the natural import of the words of the will, to receive parol evidence were to contradict the will. But where the presumption is contrary to the primary and more obvious language of the instrument, such evidence may be let in. 3d. Where the legacy is last

Gilliam v. Chancellor & Murray

in order of time, and the presumption is that it shall be construed or held as satisfaction of an existing debt or a stipulated portion, it seems more difficult to admit parol evidence. Hence, in most cases of this character, the parol testimony has been rejected." The case before us falls within this last classification.

The doctrine of ademption, as set out in the English authorities, have been fully sanctioned by the American courts. *Paine v. Parsons*, 14 Pick. 320; *Clark v. Jetton*, 5 Sneed, 229; *Rogers v. French*, 19 Ga. 320. In *Rogers v. French*, parol evidence was admitted on the point of the intention to adeem.

The investigation we have made into the subject, both of the ademption and parol evidence, to establish or remove the presumption of that intent, have impressed us with the painful vacillation and uncertainty which have marked the course of the decisions. With many jurists, it has been regretted that the doctrine of satisfaction, performance or ademption has been pushed so far, and the tone of the modern cases is to accept it as a rule of equity, because it has been sanctioned by a weight of authority which no court would feel at liberty to disregard.

We do not feel called upon in this case to express any opinion on the extent to which the rule may go, for the admission of evidence extrinsic the will, on the point of the intention to adeem. It seems to be agreed in all the cases, that if the will itself is explicit, either the one way or the other, there is no room for the admission of the extrinsic evidence.

At last, like most others arising on last wills and testaments, the purpose is to arrive at what the testator really meant and intended. If the will itself fairly expresses the testamentary mind, there is no reason to go outside the instrument to get foreign aid.

On questions of interpretation, it is always competent by parol to prove the situation of the testator, the condition, character, etc., of his property, etc., so that the court, as nearly as may be, may realize the surroundings of the testator, his relations to the subject with which he is dealing, and thereby be the better qualified to reach his meaning and purposes through the language employed in his will to express them. The testimony shows this state of affairs at the date of the will. Gilliam had unshaken faith in the success of the Confederate cause, and confidence in the ultimate value of its currency. In his business he had accumulated about \$25,000 of this currency, which was then on hand. He doubtless believed that

profit would be made out of the crop of 1864, the first year of his marriage, and therefore from this source the \$5,000 which in all events he was to pay his wife for her jointure would come. The profits which he anticipated at his marriage would flow from a long series of years of successful planting, and which were to be divided between himself and wife for the benefit of their respective children, was about being brought to an end by impending death. He knew in the then condition of the country (the war flagrant) that agriculture made no substantial moneyed returns. Thus regarding his relation to his property and family, he says in his will, to his executors: "To see that his contracts are fulfilled, and that his wife, Mary Ann Gilliam, have a dowry of five thousand dollars in currency." We understand the testator as directing this payment in lieu of the sum to be paid her, for her portion or dowry, under the marriage articles. What was secured to the wife by these articles was in the stead of dowry and share of personalty; what a widow could take by law in spite of any will the husband might make. In the testator's mind the term dowry comprehended this. What the testator meant, then, was that his executors should pay his widow what he had contracted to give her, at his decease, for her dowry in his estate. This provision was meant to be in performance or satisfaction of the marriage contract.

It would follow, then, that Mrs. Gilliam is not entitled to the benefit of both the marriage settlement and the legacy; and that the latter would be *pro tanto* a satisfaction of the former. We say *pro tanto*, because we are satisfied that this legacy was contemplated by the testator to have been paid in Confederate money. If there be ambiguity as to the sort of currency meant, it is a latent ambiguity, explainable by parol testimony. The proof is clear, that the testator had on hand a large amount of this currency, and not over forty or fifty dollars of any other kind; and that he believed the Confederate currency would ultimately turn out to be valuable; reducing this to the value of the circulating medium of the United States, and it would be worth only three or four hundred dollars.

We do not, however, put the same construction on the marriage settlement. The parties naturally looked forward to many years of happiness and prosperity. They did not rush into the connubial relation, urged by the impulses of passion and affection alone, but calmly considered the act in relation to others, who stood depend-

Gilliam v. Chancellor & Murray.

ent, as children, upon each of them, as head of a separate family. Their conflicting interests were to be looked to and harmonized. Gilliam was rich, the father of several children ; Mrs. Dennis was a widow, with children, and if not poor, in moderate circumstances. The little property which she controlled was to be added to his larger estate. Prudent, economical and judicious management was to preside over the whole, and the profits equally divided. If, however, Gilliam should decease before \$5,000 had been made for the wife's part of the profits, then she should be paid that sum out of his estate. These stipulations and provisions for her to be in lieu of dowry or distributive share in his estate. For these benefits, the wife surrendered her marital rights to a property of the husband, of three thousand acres of land, and a personalty estimated at \$25,000 or \$30,000. The most valuable feature of the contract to her (and such both parties esteemed it to be), was the division of the profits and income, equally. This is a continuing contract, which may and was expected to be in the course of fulfillment for a term of years. There was no time when either party, as survivor, looked to settle with the estate of the decedent under the contract. The marriage might continue ten, fifteen or twenty years, unbroken. The sort of currency in which the \$5,000 was to be paid could not have been taken into account, because neither party could fix upon a day, near at hand, or in the distant future, when an adjustment and settlement could, by its terms, be made.

This view of the contract is fortified by that provision which reads, "if the \$5,000 shall not be realized from net income and increase of property, the deficit, either in money or *property*, shall be made up from his estate."

When a first examination of this record was made, it seemed to us that the effect or consequence of not stamping the marriage contract necessarily arose. We therefore invited counsel to furnish us with full briefs and arguments on the point. The conclusion to which we have come, after a careful consideration is, that Mrs. Gilliam had the advantage of this writing, as an instrument of evidence, in the chancery court. Its admission in evidence was for her benefit, and at her instance. And that the executors, not having prosecuted a cross-appeal, they cannot complain in this court of the decision of the chancellor in admitting it in evidence. It would, therefore, be a profitless discussion to go into the examination of the cases and the reasoning of the courts on the subject. And any

 Montgomery v. Kellogg.

conclusion we might come to, would not be obligatory on ourselves or the inferior courts.

Let the decree of the chancellor be confirmed; the plaintiff in error to be taxed with costs in this court, but to recover costs in the chancery court.

MONTGOMERY, appellant, v. KELLOGG.

(43 Miss. 436.)

Letter of credit. Guaranty. Notice of acceptance. Notice of default

A. signed the following letter of credit to B.: "Mr. C. proposes to purchase some supplies of you. * * *. In case you should let him have them, I will see the amount of his account with you paid * * * to the amount of \$400 * * *." *Held*, that the character of this letter of credit or guaranty entitled A. to notice that it was accepted and acted upon by B.; also to notice, within a reasonable time after the account was closed and the debt became due from C., that he had failed to make payment.

ACTION on a guaranty. The opinion states the case.

Yergers, for appellant, cited *Anderson v. Blaseby*, 3 Denio, 512; *Whiting v. Groat*, 24 Ward (Ohio), 82; *Hunt v. Smith*, 17 Ward, 179; *Ten Eyck v. Vanderpoel*, 8 J. R. 119; *Norton v. Eastman*, 4 Greenl. 521; *Rapley v. Bailey*, 3 Conn. 428.

Winchester & North, for appellee, cited *Howe v. Nichols*, 22 Maine, 175; *Wildes v. Savage*, 1 Story, 22; 2 Am. Lead. Cases, 75; *Kelly v. Miller*, 39 Miss. 58; *Holden v. Blaxum*, 35 Miss. 383; *Wood v. Gibbs*, 35 Miss. 581; 1 Parsons on Con. 502; *Oaks v. Weller*, 16 Vt. 63; *Train v. Jones*, 11 id. 444; *Long v. Adams*, 22 id. 160; *Reynolds v. Douglass*, 12 Peters, 497; 2 Am. Lead. Ca. 52; 25 Ala. 139; 9 Rich. S. C. 335; *Baker v. Kelly*, 41 Miss. 705; *Wren v. Pearce*, 4 S. & M. 97; *Thrasier v. Ely*, 2 S. & M. 147; 3 Kent's Com. 123; 2 Am. Lead. Ca. 92.

SIMRALL, J. Suit was brought by Kellogg & Sandusky, commercial partners, on the following writing, to wit:

Montgomery v. Kellogg.

PRAIRIE PLACE, 1st June, 1866.

Messrs. KELLOGG & SANDUSKY:

GENTLEMEN.—Mr. H. C. Coody proposes to purchase some supplies of you, payable out of the first proceeds of his crop. In case you should let him have them, I will see the amount of his account with you paid, as he may agree with you, to the amount of \$400, or less, if he should purchase less.

Yours, etc.,

ALEX. MONTGOMERY.

The several questions made in this court arise out of the rulings of the circuit court, in overruling the defendant's demurrer to the declaration, in the granting and refusing of instructions to the jury, and in denying the motion for a new trial.

1st. It is maintained by the plaintiff in error that he had no notice or no sufficient notice of the acceptance of the letter of credit or guaranty by Kellogg & Sandusky.

2d. No sufficient and timely notice of the default made by H. C. Coody in the payment for the goods taken up by him with Kellogg & Sandusky, and the non-averment or insufficient statement of these facts in the declaration, make it obnoxious to demurrer.

The allegation in the declaration is, "of all which said premises the defendant had due notice, to wit: on," etc. In *Willis v. Staten*, 5 S. & M. 353, the averment was "of all which the said defendant afterward had due notice." The suit was upon a letter of credit, for a liability to be incurred on its faith. It was held that the allegation of notice was sufficient.

The important inquiries are: What, if any, notice of the acceptance of the guaranty was the guarantor entitled to? And what notice of the default made by Coody in paying for the goods? And was the law of the case properly laid before the jury in the instructions of the court? In *Thrasher v. Ely*, 2 S. & M. 147, the doctrine is recognized that if the guaranty is of a specific existing demand, as a promissory note or other evidence of debt, then no notice of default in payment on the part of the principal debtor is required. In such case, the guarantor knows precisely what he undertakes and the measure of his responsibility. The principle seems to be, that if the guaranty is absolute in its terms, definite as to amount and extent, notice is dispensed with.

But if the guaranty be for future advances, credits or payments, it is the duty of the party making the advances to give notice to the guarantor of his acceptance, and of his consent to make the advances on the faith of the guaranty. This is very clearly settled

as the rule in the supreme court of the United States. *Burrell v. Clarke*, 7 Cranch. 69; *Edmundson v. Drake*, 5 Peters, 629; *Douglas v. Reynolds*, 7 Peters, 113; *Lee v. Dick*, 10 Peters, 482; *Adams v. Jones*, 12 Peters, 207; *Reynolds v. Douglas*, 12 Peters, 497.

If the engagement be to make advances on future contingencies, which may or may not happen, in addition to the general notice of acceptance of the guaranty, and a purpose to act on its faith and credit, it may be necessary also to advise the guarantor of the occurrence of the contingencies and the advances made, for otherwise he might not know whether any use were made of the guaranty, and might, because thereof, lose opportunity to obtain indemnity from the principal debtor. *Crumer v. Higginson*, 1 Mason, 323.

In *Douglas v. Reynolds*, already cited, it was declared in reference to a continuing guaranty for acceptances, indorsements and credits, that it was but reasonable, when the whole transactions were ended, notice of the amount claimed from the guarantor should be given within a reasonable time afterward.

The purpose of the notice is that the guarantor may at once set about securing himself against loss. When the letter of credit, therefore, is continuing, and indefinite as to amount, the reason is stronger for a prompt notice of a default in the principal debtor, and its amount. The principles which have been stated and illustrated in the adjudications of the supreme court of the United States have been accepted here and recognized. 4 How. 231; 5 S. & M. 347. The character of Montgomery's letter of credit, or guaranty, entitled him to notice that it was accepted by the plaintiffs, and that they would act under it; and also, after the transaction was closed, and the debt became due from Coody, that he had failed to make payment. And this last information must be communicated within a reasonable time after default made, unless, indeed, there was some reason potent enough to relieve of the duty of imparting notice. For it should be borne in mind that the object of the information is to enable the guarantor to protect and save himself from loss. If notice, by no possibility, could be of service to him, as where the debtor was absolutely and hopelessly insolvent, then it seems it may be dispensed with. It must be observed, also, that the same promptness is not exacted, in giving notice, as the law merchant demands of the dishonor of commercial paper. The latter is of strict right; and whilst letters of credit, or of guar-

Montgomery v. Kellogg.

anty, are of commercial origin, and, of consequence, have drawn to their construction and import the principles of commercial law, they stand, as to this matter, on a broader ground than negotiable paper. Generally, if the debtor was insolvent when the debt became due, and has ever since so continued, no notice to the guarantor is necessary—not even a demand of payment of the debtor when the debt became due. *Warrington v. Furber*, 8 East R. 242; *Van Wirt v. Wilkins*, 3 Barn. & Cress. 439–447.

We will refer now to the testimony, and see what evidence went to the jury as to notice of acceptance and notice of default. Robert Coody deposed that H. C. Coody applied to Kellogg & Sandusky to furnish him with supplies; they refused unless the defendant, Montgomery, would guarantee payment. Mr. Kellogg, of the firm, wrote the letter of guaranty, which they required Montgomery to sign before they would open the account. The paper was handed to Judge Montgomery, who signed it. It was then taken to Kellogg & Sandusky. About the time of opening the account, and after Montgomery had knowledge of the credit, he asked witness if goods were got on the faith of this paper; witness answered affirmatively. At Montgomery's house, about the time they were fairly picking cotton, and before disposing of any cotton, Montgomery said he was in receipt of a letter, stating that Coody's account was due and unpaid, and asking what arrangement was made for payment. Montgomery had notice within ten days after the account was opened.

H. C. Coody says that Kellogg & Sandusky agreed to supply him goods on the guaranty of Montgomery. Demand of payment of the account was made on Coody, shortly after it was due, and a letter written by the book-keeper to Montgomery, notifying him of non-payment.

The testimony on behalf of the defendant does not agree in several particulars—as to date of notice of default particularly. The testimony was quite enough to justify the jury in the conclusion that Montgomery received notice that the goods would be advanced on his guaranty. The notice, whether of acceptance or of default in payment, need not be given in any precise form, nor in writing; but may be inferred from facts and circumstances in the evidence. *Reynolds v. Douglas*, 12 Peters, 496; *Oaks v. Weller*, 16 Vt. 70.

What is a reasonable time for the performance of an act is, by the authorities, rather referred to the court as a question of law

than of fact to the jury. In the administration of justice, there are many cases where certain general propositions can be laid down, but when they come to be applied they encounter a variety of incidents unforeseen and not before contemplated, and in reference to which no general rule could beforehand be prescribed; the court must exert its best discretion and judgment in determining what the law must be deemed to be as applicable thereto. Such is the inevitable result of all things depending on human foresight.

Precedents often cannot, on account of the endless variety and complication of transactions, dissimilar often to any that have occurred in any previous case, be referred to as aiding in the formation of a judgment on a proposition like this. Therefore, the great propriety of the suggestion of Judge STORY in the case of *Wilds v. Savage*, 1 Story, 22, that it is difficult, and perhaps dangerous, to attempt to lay down any general rule as to what is reasonable notice, leaving each case to stand on its own distinguishing and special features.

In the cases cited from 7 Peters, 113, and 10 id. 482, it was said the guarantor must have notice of the amount for which he is held, as well as default of the principal debtor in a reasonable time. But it is not attempted to define what would be reasonable time. In *Howe v. Nichols*, 22 Me. 178, the court expressed an appreciation of the intrinsic difficulty, if not impossibility, of laying down any precise rule.

As respects negotiable paper, the custom of merchants and the decisions of the courts have given precision and definiteness as to what shall constitute reasonable notice to drawers and indorsers. But, as we have already said, the same strictness does not apply in favor of the guarantor.

Looking to the special facts in this case, we are of opinion that Montgomery had notice, within reasonable time, of the non-payment by the principal debtor. For the fundamental principle as the basis of the rules on this subject is, did the want of notice or delay to give it operate injuriously to the guarantor? If so, he is to be released according to the circumstances *pro tanto* or *in toto*. 1 Story, 22; 22 Me. 179. Testimony was before the jury, to the effect that whilst Coody was gathering his cotton, and before any of it was sold, Montgomery had knowledge that the account had not been paid, and that he was looked to for payment. Referring to the letter of credit, the first sentence reads thus: "Mr. H. C.

Montgomery v. Kellogg.

Coody proposes to purchase some supplies, *payable out of the first proceeds of his crop.*" The cotton was the fund out of which payment was to be made. It was because of Montgomery's confidence in this resource that he incurred the liability. Having notice before any of the cotton was sold, it was in time to enable him, if he could, to obtain indemnity, or see to the application of the cotton to the debt. It is not shown that he has lost anything, or any opportunity to save himself from loss, by not receiving earlier advice.

The letter of Montgomery, in evidence to the jury, does not claim exemption from liability on the want of notice; but rather that the goods were furnished R. Coody, for whom he was not surety, and a claim that H. C. Coody must be first sued, as defendant was only surety. The instructions to the jury accord with these views. Perhaps the third instruction granted on the prayer of the defendant is broader than would be warranted by the authorities, and was certainly as favorable to the defendant as he could ask; but as to this we are called upon to give no opinion.

It is complained that the court erred in refusing a prayer in these words: "If the jury believe, from the evidence, that the defendant has incurred any liability, it is as surety for H. C. Coody, the principal, and that said defendant gave written notice to the creditors, plaintiffs in this action, to commence and prosecute legal proceedings against said principal debtor, and the plaintiffs refused to do so, to the next term, to be held thirty days after giving notice, and to prosecute the same to effect, the defendant is discharged from liability," etc. The principle embraced in this prayer has no application or fitness to the facts of the case, and therefore the court was right in withholding it from the jury. On the acceptance of the guaranty and notice of non-payment by Coody, the liability of Montgomery became fixed and absolute, with an immediate right of action against him—an original liability.

The decisions of the circuit court on the several points raised in that court being in accord with these views, we affirm the judgment.

Judgment affirmed.

JARNIGAN, appellant, v. FLEMING.

(48 Miss. 710.)

Slander. Malice. Malicious prosecution — witness — privileged communication — repetition of slanderous words.

In an action of slander, *held* (1), that the slanderous sense of the words spoken is not to be determined by the understanding of the hearers, where the language is plain and direct; (2) that the question of malice is never to be determined by the opinion or understanding of the hearers; (3) that the defendant may prove that he was acting from a sense of moral and legal duty; (4) that express or actual malice need not be shown except in cases of privileged communications; (5) that where the defendant pleads justification, he may prove the truth of the matter spoken, which will constitute a sufficient defense; (6) that the commencement of a malicious suit by a third person against plaintiff, may be proved as the result of the slanderous words; (7) that where a party introduces a witness, he does not thereby indorse his credibility, although he cannot impeach such witness; and (8) that the repetition of slanderous words must be done from good motives and without malice, and the repeater must give, not only the precise words of the author, but the name of a responsible person against whom the injured party may bring his action.

ACTION of slander. The opinion states the case.

J. W. Thompson and *Geo. L. Potter*, for appellant, cited 1 Starkie on Slander, 233, note 1; id. 235; id. 237, 238; 11 Johns. 38; 10 id. 349; *Doss v. Jones*, 5 How. 164; 3 Mass. 553; 1 Stewart's Ala. 138; 1 Hill. on Torts, 334, § 107; id. 350, §§ 343, 344; id. pp. 410, 411, 412; 13 Ala. 127; 5 Ind. 426; 2 Strange, 1200; 29 Maine, 1; 1 Doug. 321; 13 Johns. 475; *Van Ankill v. Westfall*, 14 Johns. 234; *Munning v. Clement*, 7 Bing. 367; 2 Greenl. Ev., § 424; 15 Ala. 663; 1 Hill. on Torts, 414, § 181; 3 Hawk. 395; 5 Leigh, 695; 1 Hill. on Torts, 418, § 183; 10 Vt. 353; 11 Johns. 38; 1 Starkie on Slander, 334; 1 Hill. on Torts, 418, 419, § 183; 4 Iredell, 461; 10 Humph. 461; 1 Hill. on Torts, 442, § 188; 1 Smith, 287; 6 Barr, 170; 8 Blackf. 495; 25 Me. 315; 3 Barb. 599; 1 Cart. 92; id. 544; 7 Term R. 17; Hill. on Torts, 428; 5 B. Monroe, 519; 8 id. 16; 12 Vt. 450; Hill. on Torts, 430, § 194; *Scott v. Peebles*, 2 S. & M. 559; 3 Dana, 432; 2 Greenl. Ev., §§ 378, 379, note 2; *Dale v. Lyon*, 10 Johns. 447; *De Crespeigny v. Wellesley*, 5 Bing. (English) 392; 1 Starkie on Slander, §§ 337, 338, 339, 340, and notes; id. 340; *Mapes v*

Jarnigan v. Fleming.

Weeks, 4 Wend. 659; *Inman v. Foster*, 8 id. 602; 3 Yates, 518; 2 Greenl. Ev., §§ 424, 425, and notes; Hill. on Torts, 288-296, § 57; id. 423, § 106; id. 293, §§ 57, 58; 1 Starkie on Slander, 45, 46, 47; id. 60; 5 Johns. 221; 2 Wend. 534; 4 id. 320; 1 Starkie on Slander, 79, 80-88, 89; 2 Greenl. Ev. 365, 366, § 414, note 1, on p. 366; Hill. on Torts, 333, 334, § 107; id. 342, §§ 116, 117.

Stricklin & Stricklin and *Johnston & Johnston*, for appellee, cited 2 Bouv. Law Dic.; 1 Hill. on Torts, § 243; 1 id., § 333; 1 id., §§ 335 and 108; 1 Stark. on Slander, § 381; 4 Cald. 29-31; also, 2 Greenl., § 424, 425; 1 Hill. on Torts, 342, § 116 and 117; also, see 2 Hump. 512; 2 Stark. on Slander, § 51; also 1 S. & M. 458 and 463; also 1 Hill. on Torts, 292, § 57; 2 Swan. 32; *Elzey v. State*, 5 S. & M. 21; *Leftore v. Justin*, 1 id. 381; *Dickson v. Parker*, 3 How. 838; 1 Hill. on Torts, 318, § 1; id. 311, 318, § 1; id. 317, § 1, note c, and cases cited; 1 Hill. on Torts, 335, § 16, note 2; id. 230, 231; id. 347, § 26; id. 192, § 52; id. 228, § 4; 1 id. 308, § 1; id., § 2; id. 381, § 1, note 1, and cases cited; id. 417, § 4, note 1, and cases cited; 3 How. 214; 4 id. 90; 8 S. & M. 193; 27 Miss. 362; id. 739; *Neely v. Planters' Bank*, 4 S. & M. 113.

IV. *C. Falkner*, on the same side, cited 35 Miss. 381; see Phillips on Ev. 308, 309; 31 Miss. 314; *Garland v. Stewart et al.*, 8 S. & M. 305-313; 30 id. 369-387; 35 id. 382-384-559-580, 581.

TARBELL, J. This is an action on the case for slanderous words spoken. The declaration contains four counts. The first count charges that the defendant falsely and maliciously stated that plaintiff was guilty of seducing and cohabiting with one Margaret Little, being in the family of defendant, and of causing her to become pregnant and with child, the defendant at the time knowing the plaintiff to be innocent. This count further charges that defendant maliciously procured and induced one Thomas D. Little, uncle of Margaret Little, to bring a suit at law, as her next friend, against plaintiff for a breach of marriage contract between plaintiff and said Margaret; that defendant consulted and employed lawyers to bring the suit; that Thomas D. Little was insolvent and irresponsible to the knowledge of defendant; and that plaintiff was put to large expense in the employment of counsel to defend the said suit, etc. The second count avers that defendant stated that plaintiff was

caught in bed with Margaret. The third count alleges that defendant stated that plaintiff was guilty of fooling the girl and getting her in the family way. The fourth count avers that defendant stated that plaintiff was detected in the act of criminal intercourse with said Margaret. The defendant pleaded the general issue, and also the truth in justification.

The testimony is somewhat voluminous, and the instructions of the court numerous. The record presents no objections to the testimony or witnesses, except a technical objection to the deposition of Thomas D. Little. The wife of defendant was examined as a witness, without objection, as far as appears by the record. The jury returned a verdict for the defendant, and the plaintiff asked for a new trial upon the ground that the verdict was contrary to the law and the evidence, and contrary to and in violation of the instructions of the court, which motion being overruled, the plaintiff brought writ of error, and assigns here, for cause of reversal of the judgment against him, the following errors:

1st. The court erred in giving the second, third, fourth, fifth and sixth instructions for defendant.

2d. The court erred in overruling plaintiff's motion for a new trial.

3. The court erred in permitting the wife of defendant to testify as a witness in the cause for the defendant, her husband, against the objections of plaintiff.

As the record fails to show any objection to the testimony of the wife of defendant on the trial, we are unable to entertain that point here; so that the only questions for our consideration are embraced in the instructions for defendant, objected to by the plaintiff, and such further questions as are raised by the motion for a new trial.

The second instruction for defendant, and objected to by the plaintiff, is as follows:

"In actions of slander, it is the sense and application of the words spoken, as understood by the hearers, which causes the damage and constitutes the very gist of the action, and if the jury believe from the evidence that the words used by Fleming were not understood by the hearers in a malicious or slanderous sense, then they must find for Fleming."

"The facts and circumstances attending the utterance of the words charged to be slanderous; the understanding of the hearers, where the words are ambiguous, or where the slander is contained in a

Jarnigan v. Fleming.

question, a fable, an enigma, or the like; and the question of malice, as derived from the words and circumstances, are all the subject of inquiry on the trial, and for the determination of the jury. In the case under consideration, the words used are in the plain and ordinary language in common use. They are not ambiguous nor doubtful. The slander was not uttered by means of a foreign language, nor by allegorical, hyperbolic, or other figurative sense. No interpretation is required to communicate the sense of the words used. In this case, therefore, they are to be taken in their plain and obvious sense. Under such circumstances, and upon all the facts, the jury are the judges of the meaning and intent of the words, and of the malice of defendant." The foregoing instruction constitutes an independent tribunal to determine for the jury what should have been submitted to their own judgment, after all the facts and circumstances had been presented by the testimony. The understanding of the hearers is sometimes a proper subject of inquiry, but their opinion as to the meaning and intent of the defendant, the language being unequivocal, is improper.

The question of intent is one peculiarly within the province of the jury, and the latter clause of the above instruction was in no small degree calculated to mislead them; partly, because the terms used are ambiguous to non-professional gentlemen; to some extent because the malice or slanderous sense is an inference of law and not of fact; but mainly, because the "malicious or slanderous sense" of the words used, cannot be referred to and determined by the understanding of the hearers, where, as in this case, the slander is communicated in plain and direct language; nor is the question of malice determinable, upon the opinion or understanding of the hearers, under any circumstances. 4 Scam. 30; 12 Johns. 249; 3 id. 239; 3 Hawks. 474; 2 Wend. 528; 4 id. 320; 12 Ired. 377; 1 Sneed, 458; 23 Ill. 500; 2 Gilm. 726; 9 Mo. 769.

The third instruction for defendant is as follows: "If the jury believe from the evidence in this case that Fleming did not utter the words complained of from malice, express or implied, towards the plaintiff, but only from a moral and legal sense of duty to one under his care and protection, and for no other reason, and without any design to injure the plaintiff's reputation, or to deprive him of any part of his estate unlawfully, they should find for the defendant. Malice is a necessary ingredient in every action of slander. But in actions of this kind, malice must be understood in its legal

signification, as well as in its common acceptation. Malice, in its common acceptation, means ill-will against a person. Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse."

This instruction is confused, and otherwise erroneous. Express or actual malice need not be shown, except in cases of privileged communications. In such cases, the malice being repelled, the plaintiff must prove actual malice. In all other cases, the malice is implied, and need not be proven. Except to a jury of lawyers, this instruction could afford no guide to a correct conclusion, but rather the reverse.

Whether the defendant was acting from a "moral and legal sense of duty to one under his care and protection," involved questions both of law and fact. What was the moral and legal duty of defendant? Did he act from such motives? These were questions for the jury.

The testimony shows that this girl was living at defendant's, without wages; that she worked in the kitchen and milked the cows; that in the absence of defendant and his wife from home, they usually sent Miss Little to her uncle or to their friends to stay during their absence, but that, to their knowledge, she was in the habit of returning to defendant's house before the return of the latter, and of frequently visiting the negro quarters, for which they often reproved her. It appears also that defendant referred the prosecution of Jarnigan to Thomas D. Little, and desired to send the girl from his house to the house and care of her uncle, about which they differed so earnestly, as to submit the settlement of the question to arbitration. Could defendant have felt under a sense of legal or moral duty toward one under these circumstances? And did he act from a sense of moral or legal obligation toward the girl? We are not prepared to say that the instruction assumes the affirmative of these questions, but it would have been more satisfactory if the judge on the trial had analyzed this instruction, and presented to the jury the several questions therein, with suitable explanations of the legal terms used. 3 How. U. S. 266; 19 Barb. 111; 3 Denio, 110; 3 Sandf. 341; 23 Ill. 498; 5 Cush. 104; 1 Denio, 488; 4 Comst. 162; 12 Pick. 163; 10 Vt. 353.

The fourth instruction for defendant is as follows: "It is lawful for the defendant upon the trial of an action of slander, where he pleads justification to give in evidence in his defense the truth of

Jarnigan v. Fleming.

the matter, written, spoken, or published, and if the defendant prove the charges to be true, this constitutes a sufficient excuse for the utterance of the words."

This instruction is a correct, legal proposition, but if the record before us sets forth the testimony correctly, there was no pretense of proving the truth of the slanderous words. Indeed, the plea of justification was filed subsequent to the birth of a negro child. The defendant, as alleged, had reported the plaintiff as guilty of getting the girl with child; that they were caught on the bed together, and in the act of criminal intercourse. There was no proof of the truth of either of these charges. Proof that they were standing on the floor, is not evidence that they were caught on the bed together. Proof of actual intercourse, if the girl is to be believed, is not proof that they were caught in the act. Justification, on the ground of truth, utterly and wholly failed. The instruction, therefore, has no application to the case. The plaintiff cannot be found guilty of the conduct imputed to him upon suspicion; nor will proof of other improper acts, outside the record, justify the defendant. The evidence under the special plea should have been rejected or withheld from the consideration of the jury. 12 S. & M. 328; 38 Miss. 227; 4 Ired. 461; 10 Humph. 461; 1 Smith, 287; 8 Blackf. 495; 25 Me. 315; 3 Barb. 599.

The fifth instruction for defendant is as follows: "If the injury complained of is in itself the institution of a judicial proceeding for some alleged offense before a tribunal having jurisdiction, it is not the ground of an action of slander at all, but only of an action of malicious prosecution or malicious suing out a warrant, in which bad motives and a want of probable cause must be shown."

No objection appears to have been made to the declaration because of its statement of the suit of *Little v. Jarnigan* nor was objection made to the evidence with reference to it, though there was an objection upon technical grounds to the depositions of Thomas D. Little, wherein evidence in regard to that suit was detailed, but not to the evidence itself. As a distinctive cause of action, the statement of the action of *Little v. Jarnigan*, in the declaration in this case, might be objectionable on the ground of a misjoinder of actions, but for some purposes we think it proper. This instruction was not only inapplicable, but, in its connections, calculated to have a fatal influence on the minds of the jury. A

malicious prosecution may be the most effective mode of propagating a slander, and in many cases an action lies for the injury to the character. In an action for malicious prosecution, damages may be recovered for the injury to reputation, and this will be a bar to an action of slander for the same cause. So, undoubtedly, a recovery in an action of slander for injury to character through a malicious prosecution would be a bar to a claim for damages on the same ground in a direct action for malicious prosecution. As we understand the first count of the declaration, it is for slanderous words spoken, the suit of *Little v. Jarnigan* being set out as the result or consequence of those slanderous words, and as a means of greater and more injurious publicity, or to show malice or enhance the damages. 9 N. H. 9; 4 N. Y. 579.

The sixth instruction for defendant is as follows: "The defendant asks the court to charge the jury, that when a party introduces a witness on the stand he thereby indorses his credibility, and that the party who introduces the witness cannot impeach the credibility of the witness so introduced by him."

This instruction is so objectionable that were there no other grounds of error, this alone would be fatal. It would be objectionable in any case, but in this instruction the plaintiff is made to indorse the credibility of a witness proven to be almost, if not quite, a vagrant and a wanton. It is sufficient that a party cannot impeach a witness introduced by himself, without being declared to the jury, under the authority of the court, to have indorsed his credibility. The rule is clearly stated in the books, and should be strictly adhered to by *nisi prius* judges. The enlargement, as in the case before us, would be unjust and pernicious. In this case, in connection with the series of instructions for defendant, it must have had an important if not a controlling influence upon the verdict.

Upon the refusal of the court to grant a new trial, without commenting upon the weight of evidence, we observe, that the defense is presented by the general issue, and a special plea of the truth in justification. Under the general issue the defendant may give in evidence any mitigating circumstances to reduce the damages. Art. 96, p. 493, Rev. Code. But he cannot prove the truth of the charges nor give evidence tending to prove their truth. The general denial puts in issue the utterance of any words; of the words charged in particular; of their import, and of the intent of their publication.

Jarnigan v. Fleming.

As already observed, the publicity of slanderous words, unless privileged, or under circumstances repelling the presumption, is *prima facie* or presumptively malicious. In other words, malice is implied when the slanderous words are uttered under circumstances which the law holds to be without justification, palliation, or excuse.

If the mitigating circumstances appear upon the plaintiff's own showing, then he must prove malice in fact or express malice. If they do not thus appear, the defendant may prove, under the plea of not guilty, any facts which repel the implication of malice, not proving or tending to prove the truth of the charges. In addition to the facts and circumstances attending the utterance of the words, he may prove, among other things, that he was acting from a sense of moral and legal duty; that he had repeated only what he had been told by another; and that the communication or publication was privileged. In regard to the sense or weight of moral and legal duty which impelled the defendant in this case, we have nothing to add to what we have already said on that subject. In the repetition of a slander, the repeater must, at the time, give not only the precise words of the author, but the name of a responsible person against whom the plaintiff may have his certain cause of action. Even then the responsibility of defendant depends upon the *quo animo* with which he repeats the slander. 10 Johns. 447; 4 Wend. 659; 8 id. 602; 3 Yates, 508; 3 Dana, 422; 5 Bing. 382; 2 S. & M. 559; *Atkinson v. Patton*, 1 Cr. C. C. 46; *Hogan v. Brown*, 1 Id. 75.

Privileged communications constitute an exception to the general rules relating to libel and slander, and for the reason that they are presumed not to be malicious. The rule is well settled that if the words were spoken or the publication made upon a just occasion, the communication is privileged, and express malice must be shown in order to maintain an action. 1 Hill. 317; 23 Ill. 498; 15 Ala. 662; 3 Johns. 475; 14 id. 234; 11 N. Y.; 12 id. When the defense, in such a case, rests on the ground of privileged communications, it must be shown that the words were spoken at such a time and under such circumstances as would negative the supposition of malice in using them (23 Ill. 498) which can hardly be claimed according to the record of several of defendant's alleged conversations.

A privileged communication and the repetition of a slander must be upon a suitable and justifiable occasion; from good motives, and without malice. In the record before us there is wanting, in all the

Jarnigan v. Fleming.

conversations of defendant, anything like the expression of a desire for an amicable appeal to Jarnigan, as the supposed author of Miss Little's ruin, to do her voluntary justice. As to the frequent talks with Thomas D. Little, to induce him to prosecute Jarnigan, the jury are the judges of the motives and intentions of defendant. In his talk with Mr. Leatherwood, he said he was "bothered about the matter, and was in trouble," and had "come to Mr. L. as a friend," and to "get his advice." Mr. L. very sensibly, and as a friend ought to have done, asked defendant why he did not tell Jarnigan. Defendant said it would do no good, but also said he would get some men to go with him, and would go. We are left in doubt whether defendant thus proposed a friendly or a hostile visit to plaintiff, by getting "some men" to go with him. Mr. L., however, still further exhibited his good sense by preferring to go alone to inform plaintiff of the reports about him. Although defendant repeated these slanders to several, nothing appears of a practical character, looking to a friendly adjustment of any claims Miss Little might have upon Jarnigan. Defendant also repeated these stories to Mr. M. P. Lowry, as a friend, whose advice he sought, but whether the advice was given, or acted upon, is not disclosed. It appears that he conversed with and prepared the minds of counsel to take up the case of *Little v. Jarnigan*; but whether he was thus acting from a sense of legal or moral duty, is a question for the jury. The repetition of these charges to Judge Davis and others is apparently without purpose, other than to repeat the stories. No "occasion," justifiable or otherwise, appears in the record from the conversations with Mr. Lowry, or with Judge Davis and others. 7 Ired. 448; 15 Ill. 311; 5 Blackf. 88; 10 B. & C. 263; 26 Ala. 300.

A plea of justification is based upon the theory that the defendant uttered the words charged in the declaration. This plea must be specific to every part and particular of the declaration, as the proof must be full and complete, or the plea must fail. Character is far more sacred than property, and should be protected by courts and juries with watchful care. Persons who injure the character of others ought to be no less answerable to justice than those who injure property. The principles and philosophy of the law as to the latter constitute the basis of the rules as to the former, and a correct understanding of the one will aid in a due administration of the other. As a general rule, the same degree of carelessness and negligence which will render a man responsible for injury to pro-

Jarnigan v. Fleming.

party, will render him no less liable for injuries to character. Without intending to depart from our rule, nor to comment upon the weight of the evidence in this case, we are compelled to express, in conclusion, our inability to discover in the record the reasons of the verdict, in the face of the fact that the plea of justification was filed subsequent to the birth of the negro child.

Under proper instructions, the questions in this action are peculiarly for the jury, who, we are confident, on another trial, when fully and correctly instructed, will do exact justice between these parties.

Vide 11 Johns. R., 38; 5 id. 221; 12 id. 240; 3 id. 180-239; 11 N. Y.; 12 id.; 2 Wend. 448; 1 Min. 156; 4 Md. 454; 26 Ala. 300; 15 Vt. 245; 7 Cow. 725; 12 Wend. 546; 2 Leigh, 471; 16 N. Y. 54-442; 2 Green. 311; Owen, 51; 3 Ind. 518; 4 Iowa, 453; 13 Ala. 127; 5 Ind. 426; 20 Me.; 5 Leigh, 695; 10 Vt. 343.

Upon the points herein discussed, we refer, also, generally, to Starkie on Ev.; Hilliard on Torts; Gr. Ev.; Ph. Ev., with Cow. & Hl.'s Notes, wherein the law of slander is stated with clearness and precision.

The judgment is reversed and the case remanded.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

ADAMS, plaintiff in error, v. CLEM.

(41 Ga. 65.)

Innkeeper, liability of, for property of guest.

An innkeeper is bound to extraordinary diligence in preserving the property of his guest entrusted to his care, where the guest has complied with all reasonable rules of the inn. And if the guest, on departing from the inn, leaves his or her baggage with the innkeeper with his consent, he is liable for its safe-keeping as an innkeeper, for a reasonable time, according to the circumstances of the case.

CLAIM against an innkeeper for the value of trunk and contents.

Mrs. Clem, the plaintiff, was a guest at defendant's inn, and had her trunk in her room. On departing, after paying her bill, she said a gentleman, whom she pointed out, would call for her trunk in a few minutes; and the defendant said: "Very well." The trunk not being brought to her by the said gentleman, she sent her son for it four days after. The trunk was not delivered to him, the defendant saying that shortly after Mrs. Clem left, another lady left, and he supposed that she took the trunk.

Mrs. Clem did not pay anything for the care of her trunk after she left the inn. The defendant requested the judge to charge that after leaving the inn without any contract as to the further care of her baggage and without paying for such care, the innkeeper was not bound to extraordinary care; that if she left with no intention of returning as a guest, the relation of innkeeper and guest ceased, and that it was nothing but a naked bailment. The court

Adams v. Clem.

refused so to charge, and the jury found for plaintiff for \$150. Defendant appealed.

John C. Wells, by *S. Wise Parker*, for plaintiff in error.

H. Fielder for defendant.

BROWN, C. J. When Mrs. Clem departed from the inn, kept by the plaintiff in error, where she was entertained as a guest for pay, she left her trunk in the possession of the innkeeper, with his consent, stating that a person named by her would call for it in ten minutes. The person who was to have carried the trunk into the country for her disappointed her, and on the following Friday she sent her son to the inn for it, and the plaintiff in error had lost it in the meantime, and could not deliver it, nor did he show any diligence in taking care of it. Upon this state of facts she brought this suit, and recovered \$150, the amount of which it was shown by the evidence to have been worth, and this bill of exceptions is brought to reverse that judgment.

An innkeeper is bound to extraordinary diligence in preserving the property of his guests entrusted to his care, where they have complied with all reasonable rules of the inn. This is admitted by the plaintiff in error. But he insists that his liability as an innkeeper ceased when his guest departed, leaving her trunk in his care, and that from that time he was a bailee without compensation, and was only liable for gross negligence. We think in such case that the innkeeper with whom the baggage of his guest is left with his consent, though he gets no additional compensation for taking care of it, is still liable for it, as innkeeper, for a reasonable time, to be estimated according to the circumstances of the case, after which he would be only a bailee without hire, and liable as such. And we are not prepared to say that the time was unreasonable which intervened, in this case, before the guest sent back for her baggage.

But if we treat the plaintiff in error as a naked depositary, he is still liable, as the evidence shows that he was guilty of gross negligence, by which the baggage was lost. Indeed, he does not pretend to show diligence in taking care of it.

Judgment affirmed.

NOTE.—See *Dawson v. Channey*, 5 Q. B. 164; *Burgess v. Clements*, 4 M. & S. 306; *McDonald v. Edgerton*, 5 Barb. 590; *Wintermute v. Clarke*, 5 Sandford, 242; *Giles v. Fannilly*, 13 Md. 136; *Osie v. Wiggins*, 14 Johns. 175; *Piper v. Manny*, 21 Wend. 293; *Mates v. Brown*, 1 Cal. 227; *Calys's Case*, 1 Smith's Leading Cases, 235 and note; *Copps v. Barnard*, id. 246 and note.—REP.

POOL and another, plaintiffs in error, v. LEWIS.

(41 Ga. 182.)

Riparian rights. Right of mill owner to detain water. Estoppel.

The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has a right to the reasonable use of the water to propel his machinery, but he must detain it no longer than is necessary for its profitable enjoyment, and he must return it to its natural channel before it passes upon the land of the proprietor below.

What is a reasonable detention is a question for the jury, in view of all the facts in the case, taking into account the nature and use of the machinery, and the use of the water necessary to its profitable employment. If the owner detains the water no longer than is necessary for its profitable use, he is not liable in damages to the proprietor below.

Where the owner of an iron furnace upon a stream claims that the owner of a mill above his works had bound himself by verbal contract that he would never stop the usual and constant flow of the water in the channel of the stream, and the owner of the furnace, after the death of the owner of the mill, stood by and saw the mill sold by the administrator of the deceased, to an innocent purchaser, and gave no notice of the verbal agreement between himself and the deceased, he is estopped from setting up the verbal agreement against the purchaser who invested his money without notice of it, and the parties stand upon their respective rights under the general law governing riparian proprietors in the use of the water in the stream.

THE plaintiffs brought this action alleging that they were the owners of a furnace on Stump creek, and had the right to use the waters of said creek therefor; that the defendants owned a mill above, on said creek, and had, by means of dams, etc., prevented the water from flowing in its usual course and volume to their works, and thereby, for three months during the summer, prevented them from operating their furnace. They also claimed a parol contract with the father of defendants then owning said mill, whereby he had bound himself and his privies never to obstruct the water.

The defendants pleaded the general issue and showed that their mill was built in 1845, and had been run ever since; that they had used the water as carefully as they could to prevent damage to plaintiffs; that they had never stopped the water but once or twice and then to repair their machinery. It appeared also that in summer the creek was very low, and that it was customary to stop the furnaces during that season, and that the water was then hardly

Pool v. Lewis.

sufficient to run the furnace had the mill been away. It also appeared that defendants bought the mill at public auction at the sale of their father's property, and that Pool was present at the sale, and gave no notice of any contract with their father as to the use of said water, and that they had no knowledge of it.

The jury found for the defendants, and the plaintiffs appealed from the order refusing a new trial.

W. T. Wofford and *Warren Akin*, for plaintiffs in error.

Abda Johnson, by *W. H. Dabney*. *John W. Wofford*, and *D. A. Walker*, for defendants.

BROWN, C. J. The controlling question in the case is, had the defendants the right to use the water in the stream, as they did use it, for the purpose of running their mill, located a short distance above the furnace of the plaintiffs? Judge PARROT, who presided on the trial, left it to the jury to determine whether the use and detention of the water, by the defendants, were reasonable and necessary, under the circumstances of the case made by the evidence. We see no error in this.

In Washburn's Easements and Servitudes (side page 267), the rule is laid down as follows: "The question of a reasonable use of the water by the mill-owner above, depending, as it must, upon the size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case, must be determined by the jury and not by the court." It seems to us that a correct rule, as to the use of the water by the owner of a mill on a stream, is found on side page 253 of the same book, in the following language: "But in doing so, he must use the water in a reasonable and proper manner in propelling and operating a mill, suited and adapted in its magnitude to the size and capacity of the stream and the quantity of water flowing therein. Nor could he detain the water an unreasonable length of time, nor discharge it in such excessive quantity that it would run to waste. He must use the water in such a way and manner that every riparian proprietor, at points further down the stream, will have the use and enjoyment of it, substantially, according to its natural flow, subject, however, to *such disturbance and interruption as are necessary and unavoidable*, in and by the reasonable and

proper use of it for the operating of a mill of suitable magnitude, adapted and appropriate to the size and capacity of the stream and quantity of water flowing therein."

In the case of *Hetrick v. Deuchler*, 6 Penn. R. 82, the plaintiff's works were an ancient grist-mill, the defendant's a modern saw-mill, on the same stream. In operating his mill the defendant sometimes detained the water from three to five days or more, and, besides using the water for driving his mill, applied it to irrigating his land. Besides this, he at times let out so much water from his own as to flow the plaintiff's mill. The court were urged to rule that such a detention must necessarily be objectionable, as being a violation of the plaintiff's rights. But they declined so to do, and submitted the question to the jury, whether it was a reasonable detention of the water or not. If he detained it no longer than was necessary for his proper enjoyment of it, the plaintiff cannot recover, unless, as the court added in their instructions, the defendant detained the water vexatiously or wantonly. And the whole court, in commenting upon and approving those instructions, refer, as a test of what may be done, to the "reasonableness of the detention depending, as it must, on the nature and size of the stream, as well as the business to which it is subservient, and on the ever-varying circumstances of each particular case." See, also, on this point, *Mabis v. Matteson*, 17 Wis. 1; *Springfield v. Harris*, 4 Allen, 496. A large proportion of the cases, where conflicting rights are set up by such mill-owners to use of water, will be found to have been determined by the application of this broad rule, of what is a *reasonable use*, in view of the circumstances of each particular case. See Wash. E. & S., side page 266, and a number of cases there cited.

Taking this to be the correct rule, and applying it to the evidence in this case, we are satisfied these plaintiffs had no cause of action. We think the defendants made only such reasonable use of the water, under the circumstances of this case, as they had the legal right to make. The water was low in the stream, and the furnace was being run, as is shown, contrary to the practice of the judicious operators, on the same stream, under like circumstances, at a time when true economy required that it be stopped, and that the time be appropriated to laying in stock for use, till the rise in the stream resulting from the fall rains, after which there was sufficient water for all.

At any rate, the defendants, who first got control of the water

Pool v. Lewis.

when it was too weak to supply all, had the right to detain it a reasonable time for necessary use at their mill. The court submitted the question of the reasonableness or unreasonableness of the use made of the water by the defendants to the jury, and they found in favor of the defendants. And, after a careful review of the testimony given in on the trial, we are satisfied they found correctly. Section 2205 of the Revised Code declares that "the owner of a stream not navigable is entitled to the same exclusive possession thereof as he has of any other part of his land, and the legislature has no power to compel or interfere with him in its *lawful use* for the benefit of those above or below him on the stream, except to restrain nuisances." Construing this section with sections 2201 and 2967, we think they do not change the common-law rule already laid down. They secure to the owner of the land over which the stream passes, the *legal use* of it, for the purpose of propelling such machinery as is suited to the size and capacity of the stream; provided the water is not obstructed for an unreasonable time, and is not diverted from its natural channel when it passes to the lands of the next proprietor.

But it is claimed that the evidence showed that there was a verbal contract or understanding between Pool, one of the plaintiffs, and Dr. Lewis, who built the mill, and was a partner in the furnace when built, and for several years afterward, that the water should never be obstructed at the mill, but should flow constantly in the channel of the stream to the furnace. It is not pretended that this license or contract, or whatever it may have been, was in writing. And the court below ruled that the plaintiffs could not have the benefit of it, because the right claimed to have been conveyed by it, which was a right in the plaintiffs to prohibit the detention of the water at the mill for such reasonable time as the law would otherwise allow, was an interest in land which could only be conveyed in writing. See Code, sec. 1940. While we are not prepared to say the court committed error in this ruling, we do not deem it necessary to decide the question. The evidence shows that Pool, the plaintiff, was present when the land upon which the mill is located was sold at administrator's sale, as the property of Dr. Lewis, and that he gave the bidders no notice of this parol license or contract, but permitted them to invest their money in the said property without knowledge of the right he now seeks to set up, which existed if at all, only in parol. Under this state of facts, we hold that

Pool was estopped from afterward setting up this parol license or contract, to the injury of the purchasers. And the parties are left just where the law governing in such cases, without license or contract, leaves them.

There were numerous charges asked, and exceptions to the charge as given by the court, and his refusals to charge, upon which we are asked to pass judgment. But as the points already decided must, in our opinion, control and dispose of this litigation, we deem it unnecessary to do so.

Judgment affirmed.

BREWER, Administrator, plaintiff in error, v. BAXTER et al.

(41 Ga. 312.)

Construction of instrument. Will.

An instrument in the form of a deed which conveys all the property that the maker "may die possessed of" is a will, and is only admissible in evidence after due probate.

BREWER, as administrator of Stephen Baxter, sued the defendants, sons of deceased, to recover certain personal property belonging to the estate which they refused to deliver.

One of the defendants testified that the deceased in his lifetime delivered to him the paper hereinafter described, and told him to take care of it, and to take possession after his death of all he left, and to divide the same between himself and the other defendants.

The defendants then tendered the following paper in evidence:

"STATE OF GEORGIA, }
LIBERTY COUNTY. }

"Know all men by these presents, that I, Stephen Baxter, of the State of Georgia, and county aforesaid, for and in consideration of the good-will and affection which I have and do bear to my three children, to wit: Wiley Baxter, John Baxter and Stephen Baxter, my sons aforesaid, I do hereby give and devise unto them, the said Wiley Baxter of the county of Tattnall, and John Baxter of the county of Wayne, and Stephen Baxter of the county of Liberty, I give unto them and their heirs the following property equally between them: the said Wiley, John and Stephen Baxter, and their heirs, all my estate, both real and personal, consisting of lands, money and evidences of debt, horses, cattle, hogs and all the other stock of all descriptions that I may be possessed

Brewer v. Baxter.

of, to them and their heirs equally, to have the same unmolested to their own proper use and benefit forever, in fee simple. And I, the said Stephen Baxter, will warrant and defend the right and title of the same unto them, the said Wiley, John and Stephen Baxter, and their heirs, executors, administrators and assigns.

"In testimony whereof, I, the said Stephen Baxter, have hereunto set my hand and seal, this the 16th day of September, 1868.

his
"STEPHEN ~~X~~ BAXTER
mark.

"Signed, sealed and delivered }
in presence of }
"D. F. SULLIVAN,
"H. C. PARKER, J. P."

This paper had been recorded on the deed books of Liberty county, on the 18th of September, 1868. Plaintiff's counsel objected to this paper upon the ground that it was not a deed but a will, and had never been probated. The objection was overruled and the paper was read in evidence.

The jury found for the defendants. Plaintiff's counsel moved for a new trial upon the ground that the court erred in admitting said paper in evidence. The court refused a new trial, and that is assigned as error.

J. M. Farmer, by William B. Gaulden, for plaintiff in error.

A. H. Smith, by Julian Hartridge, for defendants.

WARNER, J. The only question presented on the argument of this case is, whether the paper writing set forth in the record is a deed or testamentary paper. The court below held it to be a deed, and that is assigned for error here. A paper having the formalities of a deed may, notwithstanding, be a will. In determining whether an instrument be a deed or a will, the court will not consider what the maker believed it to be, but what, in point of law, it is. The intention of the maker as to the character of the estate conveyed is the criterion by which the court will determine whether a given paper is a deed or a will, and if the intention gathered from the whole paper is, that the estate is not to pass, or the instrument to take effect *until his death*, it is a will and not a deed. *Hester v. Young*, 2 Kelley, 31. The paper writing set forth in the record conveys only such of the described property as the maker thereof "may die possessed of;" no present interest in the property was

O'Byrne v. The Mayor and Aldermen of Savannah.

conveyed to the three sons, and, until the death of the maker of the instrument, no one could know what portion of the property described therein he would *die possessed of*. Consequently, the instrument conveyed only such portion of the described property as he might be *possessed of at the time of his death*, and is, in law, a testamentary disposition of the property, to take effect *at the death* of the maker of the instrument, and if legally executed, may be proved as such in the proper court.

Let the judgment of the court below be reversed.

O'BYRNE, plaintiff in error, v. THE MAYOR AND ALDERMEN OF SAVANNAH.

(41 Ga. 331.)

Taxation during rebellion.

The right of taxation is inherent in the sovereign. So far as it exists in a municipal corporation, it is by grant, and is called a franchise.

A *de facto* government, which is able to maintain its supremacy by its armies, may exercise this power, and those who are subject to its control are bound to obedience. But if it assesses a tax and is overthrown before it is collected, the rightful sovereign whose power is established will not enforce such assessment against the subjects of the government *de jure*.

In such case, those who have paid the tax to the *de facto* government while it was supreme have no means of recovering it back, and those who did not pay till its overthrow are under no obligation to pay.

A note given since the war to the mayor and council of Savannah, for tax assessed by the city authorities during the existence of the Confederate government but not collected, is void for want of consideration.

A note given for such tax, and for ground-rent due the city, by contract made prior to the war, is void as to the tax, but good as to the rent. The consideration is clearly severable, as the record shows precisely how much of it was for tax and how much for rent.

ACTION on a note of O'Byrne for \$6,502.17, dated 23d of May, 1867, due one day after date, held by the mayor and aldermen of Savannah, plaintiffs, and secured by a mortgage on realty, which they also sought to foreclose.

The defendant alleged that said note was void, as being given in settlement of certain taxes assessed against defendant by plaintiff

O'Byrne v. The Mayor and Aldermen of Savannah.

during 1861, 1862, 1863 and 1864, which taxes were assessed for the purpose of aiding the then existing rebellion. It appeared at the trial that the plaintiff had not increased its taxes nor rates of taxation during the war, nor had levied any tax for carrying on the war, and that a part of the consideration of said note was ground-rent, due from defendant to the city. Defendant offered evidence tending to prove that, during the aforesaid years, the defendant had appropriated money to build batteries, to entertain Confederate soldiers, etc., and the reports of the mayor and treasurer of Savannah were read, to show that large quantities of the moneys of the city were expended for war purposes.

The jury found for the plaintiff, and the defendant appealed from an order denying a new trial.

John M. Guerrard, for plaintiff in error.

E. J. Harden, A. W. Hammond & Son, for defendants.

BROWN, C. J. 1. The city of Savannah, as a municipal corporation, has only such power of taxation as is granted to it by the sovereign authority. The right of taxation inheres in the sovereign. 2 Blac. Com. 37.

During the existence of the Confederate government, while the city, as is shown by this record, supported that government against the government of the United States, and the State government formed part of the Confederacy engaged in conducting war against the government of the United States, the city could claim no grant from the State, as one of the United States, to assess a tax for any purpose. Whatever powers she had while engaged in the war against the United States, under and in aid of the government of the Confederate States, she derived from the State as a member of that government. Her legal government had been displaced, and she was controlled by a government whose authority depended upon the success of the armies of the government to which it adhered, and under which it exercised its powers.

2. A *de facto* government, able to maintain its supremacy by its arms, may exercise the power of taxation, and its subjects are bound to obey its laws and pay the tax assessed, as they are unable to resist its authority. It does this by virtue of its exercise of sovereignty while it is supreme. But after it has assessed a tax, if

O'Byrne v. The Mayor and Aldermen of Savannah.

it is overthrown before the tax is collected, and the power of the rightful sovereign is re-established, the tax will not be enforced, as the rightful government will not execute the laws of the government *de facto* in imposing burdens by taxation for its own support upon the subjects of the government *de jure*.

3. In such case we hold that those who were not compelled to pay the tax, during the existence of the government *de facto*, are no longer liable for it after the government by which it was imposed has ceased to exist. And those who paid the tax have no remedy, as they can look alone to the government which received it for redress, and that has passed away and can afford none.

4. As the plaintiffs in error are not now liable to the city of Savannah for any tax assessed by her during the period while the *de facto* government of the State and city adhered to the Confederate government, and aided in the war against the government of the United States, a promissory note, given in consideration of such supposed liability, is void for want of consideration.

5. The note sued on in this case is founded upon two distinct considerations, which, as the record shows, are clearly severable. One is the tax assessed by the *de facto* government of the city during the war. The other, an amount due the city for ground-rent, by contract made prior to the war, and for the tax imposed by the rightful government since the war. The precise amount of war tax, and the exact amount of ground-rent and legal tax are clearly ascertainable by reference to the record. A contract may be either entire or severable. In the former, the whole contract stands or falls together. In the latter, the failure of a distinct part does not void the remainder. The character of the contract in such case is determined by the intention of the parties. See Revised Code, § 2683.

We hold that the court should have instructed the jury in this case to deduct the amount of the tax assessed during the war, and to find for the city the amount due for ground-rent and for tax assessed by the city authorities since the restoration of legal government over the city.

Judgment reversed.

The Equitable Life Assurance Society v. Paterson.

THE EQUITABLE LIFE ASSURANCE SOCIETY, plaintiff in error, v.
PATERSON.

(41 Ga. 333.)

Life insurance. Misstatements in the application. Fraud. Dying "by his own hand." Drunkenness.

Where one, representing himself to an insurance company to be a married man, effects an insurance on his own life for the benefit of his alleged wife and as her agent, when in fact the marriage is void by reason of the reputed wife's having a former lawful husband living at the time; and the policy contains a provision that any false statement by the assured shall invalidate it; *held*, that the policy is not void by reason of the illegality of the last marriage, unless it appears that the said reputed husband and wife knew at the time the insurance was effected that at the time of their supposed marriage the lawful husband was living, and the marriage illegal, and failed to inform the company of the fact.

Held, also, that death from an over-dose of laudanum, taken by mistake, while in a drunken condition, is not dying "by his own hand;" but death from laudanum taken with intent to destroy life, though while in a drunken condition, would be dying "by his own hand."

ACTION on a policy of insurance. In 1867, James A. Paterson caused his life to be insured by the defendants, a corporation, in behalf of and for the benefit of the plaintiff, Catharine A. Paterson his wife, in consideration of the premium of \$136.30, to be paid semi-annually during the life of the assured. Among the stipulations in the policy were, that it should be void "if the assured shall die by his own hand within two years from the date of said policy," "or if the declarations made in the application for said policy, or if any statement respecting the person or family" of the assured, "should be found in any respect untrue." The application also provided that "any untrue or fraudulent answers or statements, any suppression of facts respecting his health or family history," etc., "shall render all policies issued under or by reason of this application null and void." Among the statements in the application were these: that he (applicant) was married; that his habits of life had always been correct and temperate; that he very rarely used ardent spirits, malt liquors or wine; and that the person named as beneficiary was his wife.

The premiums were regularly paid. In May, 1868, the assured

The Equitable Life Assurance Society v. Paterson.

died, of which fact notice and proof were made to the defendants as required by the policy.

The defendants alleged that Paterson's statement in the application, that he was a married man, was false, and that plaintiff was not Paterson's wife, as was therein stated, but was the wife of one John H. Talbird, but that she had undertaken to marry Paterson, and was living with him under such circumstances that, had they been fully disclosed, the policy would not have been issued; that in 1863, she and Paterson had procured the passage of a private act, relieving them from the penalties of marrying while said Talbird was alive, representing that at the time of their marriage they supposed him to be dead, which facts were fraudulently concealed from the defendants; that she had no interest in Paterson's life; that she had been faithless to Paterson and drove him to desperation, and that he was about to separate from her when he died; that Paterson's death was the result of poison taken voluntarily by him or administered by her, and that she, with knowledge of the fact, refused and neglected to call medical aid, whereby he died.

Paterson and the plaintiff were married in 1860, she having separated from her former husband in 1859, and in 1863 a private act was passed relieving them from the penalties of marrying during her former husband's life, they declaring that, at the time of the marriage, they supposed Talbird to be dead, but had since had reason to doubt it. The evidence was conflicting as to whether she knew of Talbird's existence at time of her said marriage.

It was shown that Paterson, the assured, died from the effects of laudanum taken about twelve o'clock at night, and that no physician was called until eleven o'clock the next day, and that he died at twelve — also that she was under indictment for the murder of her husband. Some evidence was also introduced to show that she was unfaithful to Paterson; that he was about to separate from her, and that her conduct at his death and funeral was strange and unnatural; which evidence was controverted.

The jury found for the plaintiff for \$10,000, and the defendant moved for a new trial, and brought this appeal from the order denying it.

Jackson, Lawton & Bassinger, for plaintiff in error.

Layd and Hurbridge & Chisolm, for defendant in error.

The Equitable Life Assurance Society v. Paterson.

McCAY, J. The law prohibiting the insurance of a life by another, who has no interest in the continuance of that life, is founded in a sound public policy. It is intended to prevent gaming policies, and to avoid that inducement to crime which would exist if it were permitted. Bunyon on Life Ins. 10, 15; Rev. Code, sec. 2776.

We do not think, however, the case at bar comes within the reason of the rule. We cannot, it is true, agree with the court below, that a marriage, where one of the parties has a lawful husband or wife living, is a legal marriage, for all civil purposes, until it is set aside. Our Code, sections 1698 and 1701, declares such a marriage void. Nor is it by our law a ground of divorce. At any rate it is not among the grounds enumerated in § 1711 of the Code. Whether our courts might not entertain a proceeding to have such a marriage *declared void*, it is not necessary to discuss.

It is true that, under our law, whilst such a marriage is void, "the children born before the commencement of a prosecution are legitimate, *notwithstanding the invalidity of such marriage*." Revised Code, § 4457. It is true, also, that a man holding out a woman as his wife is bound for her acts as though she were his wife. But this holds even if there be in fact no marriage. The most that can be said is, that for *some* purposes, the law treats the marriage as existing. But these are purposes referring to the *rights of others*, and not to the *rights of the parties themselves*.

As respects the parties and their rights, we do not know of a particular in which such a marriage is otherwise than void. Surely the wife is not entitled to dower and a year's support, etc.

By the common law, a marriage between two persons, when one was under a previously undissolved marriage, is *absolutely void*; and thus did not require a sentence of divorce. Shelford, 223, and cases cited. Certain canonical disabilities rendered a marriage *voidable*—as consanguinity, affinity, bodily infirmity, etc. In these cases, a sentence declaring the marriage void was necessary. Shelford, 223. To this class may, perhaps, be added pre-contract. *Case of Anne Boleyn*.

But impediments to marriage, such as idiocy, former marriage, etc., which existed at law, made the marriage void. Poynter on Marriage, 84.

The existence in England of two courts—ecclesiastical and common law—one administering the canon and the other the common law, kept these distinctions very clear. Here, where we administer,

The Equitable Life Assurance Society v. Paterson.

by one court, both laws, it is necessary to preserve the distinction, since it is founded in the nature of things and in the law of morals.

But though such a marriage is void, and may be so treated in any court where the facts are made apparent, we do not see that it follows that a policy of insurance, effected by the *husband* on his *own life*, in the wife's name and for her benefit, is void.

We do not think such a policy comes within the reason of the law prohibiting gaming policies, nor that it is open to the other objection, that it offers inducement to crime. In this case, though the marriage was illegal, yet in *fact* the woman had an *interest*, and a deep interest, in the life of the husband. He treated her as his wife; he supported her as such; she passed into society as such, and she was dependent upon him for support as such. It was the husband who in fact effected this policy. It was his own method of extending to this woman his assistance and protection, after he should himself be dead. Here is no gaming, since the very person whose life is insured is himself the actor in the transaction. So, too, as to the temptation to crime, offered to the beneficiary of the policy. It would seem, when the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life may, as a general rule, at least, be left to *his* discretion.

In Massachusetts (12 Mass. 115) it has been held that a sister may insure the life of her brother, if she be actually dependent upon him. And the New York cases. 22 Barb. 39, and 20 N. Y. 32, established that an insurance effected by one on his own life, for the benefit of a third person (and that is in substance this case), is good, since the idea of wager in such a case is absurd.

Our statute merely requires the person insuring to have an interest. Code, § 1776. Another section of the Code, 2778, expressly permits the insured to direct the money to be paid to his *assignee*, and if he may do this, we do not see that an insurance effected by him, as the assured of another, for that other's benefit, is not equally good. We do not think, therefore, that this policy is void simply because the marriage was illegal.

But the utmost good faith is required in such case. The applicant is bound to state every material fact in his knowledge. §§ 2671 and 2672 of our Revised Code, and 2670 of the same, contain these distinct propositions: 1st. That any variation from the truth, by which the nature, extent or character of the risk is

The Equitable Life Assurance Society v. Paterson.

affected, will avoid the policy. 2d. If the party acts *bona fide*, and states what he thinks is the truth, this does not make the policy void, but the willful concealment of a fact which enhances the risk, does do so.

To apply these principles to this case, it is clear to us that the court erred in his charge to the jury. He told them that Paterson's failure to inform the company of the true relations between himself and the defendant in error was not such a false representation as avoids the policy. We think this depends entirely on whether Paterson knew at the time what the true relations were; if he did not know, then he acted *bona fide*, and under section 2761 of the Code the policy is good. But if he did know and kept back the truth, then, under section 2762 of the Code, the policy is bad.

We think the legality of the supposed marriage was a material fact. It affected the character of the risk. No man, observant of human conduct, can fail to have noticed that disturbance in one's marital relations is, of all things, most calculated to create mental and physical unhealthiness, and no prudent company would be so ready to take the risk of a man's life, whose condition was that of Paterson, as it would had the marriage been legal.

The history of these parties is itself a striking commentary of the idea we intend to convey. Very clearly, Mrs. Paterson, as she is called, knew that her last marriage was illegal, and, very clearly, her knowledge of the looseness of the tie that bound her to Paterson influenced her conduct, in her relations to him, and in her daily association with others; add to this the impending fear of discovery, social ostracism, and the consciousness that, at any moment, as with a petard, the whole fabric of her present domestic relations was subject to be scattered to the winds; and, under such circumstances, it is surely true that there are many influences unfriendly to health, and many conducive to the formation of habits, and the indulgence in practices calculated to shorten life.

We do not say that Paterson was aware of the illegality of the marriage; that is for the jury to determine on the proof. What we mean is, that if he was aware of it and concealed it, he kept from the company facts entering materially into the nature and extent of the risk, and that concealment, willful and intentional as it was, and of facts contrary to the truth of the case, avoids the policy.

Very clearly, to our minds, a death by accident does not come within the description of dying by one's own hand. There must be an *intent* to commit suicide. Even though it be but the *intent* of a drunken man, however, it is none the less an intent.

We think, taking all the charge together, the court properly put the law upon this point to the jury, though it was somewhat obscured by the mode in which the charge was made. An accident, even though it be the result of that loss of perception produced by drink, cannot fairly be called the product of intent. But if the intent in fact exists, the other fact, that the man was maudlin from drink, and could have no very intelligent conception of his surroundings, does not help the case; since the drunkenness is his own act, and society would be in great danger if one could escape the consequences of his acts by the plea of drunkenness.

Judgment reversed.

HILL, plaintiff in error, v. WILKER.

(41 Ga. 442.)

Lord's day—contracts made on. Lex loci contractus.

Where a note was made and delivered in the purchase of a mining privilege at Pike's Peak, in Kansas, on the Sabbath day, and suit thereon is brought in the courts of this State, and there is no evidence of the *lex loci contractus* produced on the trial, *held*, that the presumption of law is, that the law of the place where the note was made is the same as our own; especially will such presumption be made where a contrary presumption would be unjust to the Christian civilization of the age, and in violation of the decalogue. As the laws of this State forbid, under penalties, any violation of the Lord's day by the transaction of any business, trade or calling, a note made upon the Sabbath day, in pursuance of trade or business, will not be enforced by the courts of this State under the laws of this State, as such contract is void.

ACTION on a note, in which the jury found for the plaintiff, and defendant appealed. The facts are stated in the opinion.

H. P. Bell, for plaintiff in error.

George D. Rice, for defendant.

LOCHRANE, Ch. J. This was an action brought on a promissory note dated May 20, 1880, given by Hill (in conjunction with others

Hill v. Wilker.

not sued), and payable to Wilker. On the trial of the case it was admitted that the note was made and delivered on the Sabbath day, and the consideration is expressed to be for a mining privilege at Pike's Peak, in Kansas, where the note was made.

The main and controlling question made by the record is, whether a note executed on the Sabbath day, and given in the business or work of the parties' ordinary calling, and not in pursuance of works of necessity or charity, is such a contract as may be enforced under the laws of this State.

There is nothing disclosed by this record relative to the laws of Kansas on this subject, and the principle of *lex loci*, or the doctrine of comity, as to how far Georgia would permit contracts violative of her public policy to be enforced, conceding such contracts to be valid outside of her territorial limits where made, but conflicting with her own system of laws and public policy, is a question we need not decide, as there is nothing in this record which would authorize this court to presume such law or statutory provision to exist.

Sitting, as we do, to administer the laws of this State in questions to be determined by our courts, we are necessarily governed by the laws as we find them existing here, except proof is made of different provisions of law existing where the contract sought to be enforced was executed. As a general rule, the laws of the place, when proved, *lex loci contractus*, will be administered by courts wherever the enforcement of the contract is invoked. But to this general rule there are exceptions, for courts will not lend their processes or powers to enforce laws which contravene the public policy, or are immoral, or in conflict with the fundamental principle of conscience or morality pervading the legislation of the State when the power of such court is invoked; and this court, while it broadly and in the widest sense recognizes comity upon all questions within its legitimate scope and operation, has nevertheless asserted in its prerogatives of justice these exceptions to the general rule.

In this case, however, the question is, what construction courts will give to the law of contracts, where there is no proof of the *lex loci*. And we hold, in the absence of proof to the contrary, the legal presumption is, that the *lex loci* is the same as our own. We are sustained in this presumption by the fact that a contrary view would suppose the people of Kansas to have annulled the decalogue, and to have permitted by law the disregard of Christian obligation,

and not only forgotten but violated the injunction, "Remember the Sabbath day to keep it holy; in it thou shalt do no manner of work." This State, for over a century, has recognized upon her statutes the sanctity of the obligation, and punished its violators. All worldly labor or work done in the ordinary calling of our people on the Lord's day is forbidden under penalties, and only such acts as necessity invokes or charity inspires are exempted from their infliction.

This court, in 31 Ga. 607, has expressly ruled that the payment of money on a note was a transaction in violation of the law, it being made on the Lord's day or Sunday, and did not constitute such an acknowledgment of the debt as would raise the presumption of a promise sufficient to take the case out of the statute of limitations; that the act of payment was void, and all the obligations growing out of it were null and void.

And this is the almost unbroken current of American authorities. "A promissory note given on a Sunday is void, as between the parties, and a subsequent promise to pay it will not make it valid." *Pope v. Lynn*, 50 Me. 83. "A note signed and delivered on Sunday is invalid." 48 Me. 198. A note given on Sunday, for the price of a horse sold on that day, is void. 26 Maine, 464. And the same doctrine is laid down in the following cases: 38 Miss. 344; 16 Iowa, 49; 9 Minn. 194; 8 id. 13 and 41; 9 N. H. 500; 14 id. 133; 19 id. 233; 41 id. 215; 4 Ind. 619; 13 id. 565; 1 *Hart's Cases*, Tenn. 261; 3 Wis. 343; 5 Ala. 467; 10 id. 566; 18 id. 280; 25 id. 528; 27 id. 281; 18 Vt. 379; 24 id. 317; Michigan Reports, 2 Doug. 73. And we might expand, if we had time, this cloud of authority in support of a doctrine almost without exception, and those rather in modification of the rule than in conflict with it.

Grouping, however, this mass of authority from every section of this continent, we think it would be unjust to the Christian civilization of this age to permit any other presumption than the one we have laid down, to wit: that, in the absence of proof of any law to the contrary, the presumption is that the law of this contract must be held to be the same as our own. And as our courts have held all contracts made in the pursuance of the ordinary callings or business on the Lord's day or Christian Sabbath to be void, it follows that this court so adjudges in the case at bar, and the judgment of the court below is, on this ground, reversed.

NOTE.—See *Myers v. Meinertzh*, 3 Am. Rep. 355, and note, *Bradley v. Roe*, 4 id. 524.

Conner v. The Southern Express Company.

CONNER, plaintiff in error, v. THE SOUTHERN EXPRESS COMPANY.

(43 Ga. 37.)

Bankruptcy. Abatement of action.

An action at law does not abate by the bankruptcy of the plaintiff, and if the assignee in bankruptcy be discharged, without any interference by him with the suit, it may proceed in the name of the bankrupt, the presumption, in the absence of any proof to the contrary, being that the action is proceeding for the benefit of the true owner, whoever he may be.

CONNER brought an action against the company for the loss of his goods. When the cause was called for trial, defendant's counsel said plaintiff could not proceed, because *pendente lite*, Conner was adjudged a bankrupt. This was admitted, and plaintiff's counsel then proposed to make Conner's assignee in bankruptcy a party plaintiff. It was replied that he had been discharged and this was admitted; but the assignee was present and consented to be made a party. The judge said the cause had abated, and refused to make the assignee a party. Conner's counsel then stated that they were interested, having a fee of fifty per cent. on the recovery, and proposed to have the cause proceed in Conner's name for their use. This was refused, nothing more appeared and the cause was held to have abated. These refusals and this holding are assigned as error.

H. L. Benning, J. F. Pou, Peabody & Brannon, for plaintiff in error.

Moses & Gerrard for defendant in error.

MCCAY, J. This is an anomalous case. Pending the proceedings in bankruptcy, and until the assignee was discharged, we are *not* clear that, under the bankrupt law of the United States, the bankrupt could proceed in his own name. United States Bankrupt Law, §§ 18, 43, 16. Though it would seem that, by the English practice, where the rules of pleading too are very precise, the suit may proceed in the name of the bankrupt. 2 Wilson, 372; 3 T. R. 437; 7 East. 64; 1 T. R. 463; 1 B. and Adol. 459; 2 Daniel and L. 49; 3 Taunt. 59, and *Peck v. Jenniss et al.* 7 Howard, 612.

But it appears that the proceedings in bankruptcy have been *concluded*, the whole matter settled and the assignee discharged. We

Self v. Dunn and another.

must conclude that, for some proper reason, the title to this claim has reverted to the bankrupt. *Prima facie*, that is true, because the assignee has not undertaken to control it. It may have been left to the bankrupt *after* paying *all* his debts. It may have been allowed him as his poor debtor's exemption under the bankrupt law. It may have been allowed to him on a composition with his creditors, as provided by the act, even after the fiat of bankruptcy. We do not assert, as true, any of these things. The presumption is, that the judgment of the bankrupt court, *discharging* the bankrupt and the assignee, closes up the business. If there was fraud, the fraud was in obtaining the discharge of the assignee, which will not be presumed, and cannot be set up by this defendant here. *Prima facie*, at least, this claim belongs to the plaintiff. The fact that there *has been* an assignee, and that he has been discharged, does not affect the question; since, as we have said, the *presumption* is that the assignee, as the agent of the bankrupt court, would not have been discharged, leaving this claim undisposed of, had there not been some proper reason for leaving it in the control of the plaintiff.

Surely, the debt of the defendant was not discharged. There is no other person authorized to sue it, and it is but fair to presume that the plaintiff is now pressing it for purposes consistent with honesty, and for the use of whoever is entitled to the proceeds.

We think, therefore, the court erred in holding that the suit abated, until it is made to appear that the plaintiff is not the true owner, or is not asserting this right fairly; we think he had a perfect right to proceed, and it is not for the defendant to object.

Judgment reversed.

SELF, plaintiff in error, v. DUNN AND ANOTHER.

(43 Ga. 533.)

Common carrier. Private ferry.

One who keeps a ferry for his own use and for the convenience of customers to his mill, but who charges no ferriage, is not a common carrier, and is only bound to ordinary diligence.

THE defendants, Dunn and Brown, were the owners of a custom-mill, and to make it more accessible to their customers had a ferry

Self v. Dunn and another.

boat or flat to go to it across the pond. The ferry was not chartered nor were any tolls charged.

The plaintiff, one of their customers, procured his load at the mill, and when going upon the boat to return, it got loose and his mules were drowned. He brought this action against the defendants, as carriers for hire, alleging the hire to be the increased custom obtained by reason of the ferry.

The court charged that if persons were induced to go to the mill by reason of the ferry, and defendants' business was thereby benefited, they were liable as common carriers, and bound to extraordinary diligence.

The jury found for the plaintiff, and the defendants appealed from an order denying a new trial.

A. T. Hackett and W. H. Dabney, for plaintiffs in error.

McCutchen & Shumate, for defendants.

MCCAY, J. As a general rule, a ferryman is a carrier, and, under certain circumstances, he is a common carrier. Angell on Carriers, § 82. But a carrier is one who transports goods *for hire*. Revised Code, § 2039. A common carrier is one who pursues the business constantly or continuously, for any period of time or any distance of transportation. Code, § 2040. One who "pursues the business." What business? The business of carrying goods *for hire*. A carrier is bound to ordinary diligence. A common carrier can give no excuse for loss or damage but the act of God and the enemies of the State, and even then he must use extraordinary diligence. Rev. Code, §§ 2039, 2040. And this is but a restatement of the common law, by Jones, Story, Angell and other writers upon the subject. To make one a common carrier, he must be entitled, either by the bargain or by implication, to toll or hire.

This whole question, in a case very like this in all its details, was before the supreme court of South Carolina, in the case of *Littlejohn v. Jones*, 2 McMullin, 366. That was a case of a ferry—a private ferry—used like this, as an appendage to a mill. There, however, it often happened that persons, other than customers to the mill, passed and paid ferriage; but it was understood that the payment was optional, and went to the servant, the main purpose of the ferry being to pass the customers to the mill. The

Self v. Dunn and another.

court held, in that case, that the mere fact that persons paid was not sufficient; the circumstances must be such as that there is either an express or an implied promise to pay. The use of it, as an appendage to the mill, did not alter the case.

The ferryman, in this case, was a mere *mandatary*, a bailee, not for hire, and is only liable for gross negligence. Rev. Code, § 2078. This was not even a chartered ferry, but a simple accommodation of the mill-owner to his customers. It is very subtle reasoning to say that the increased custom to his mill was his compensation. But one rarely does any act of favor to others that does not, at length, repay him. Is it fair to call that hire? We have given a good deal of search to find a case where such incidental benefits, coming to a mandatary, have been held to change his character and make him a bailee for hire, but have found none.

We think the charge was wrong on this point. The defendant was only liable for gross neglect, unless he was in the habit of charging toll. Rev. Code, § 734.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

WHITAKER v. HARTFORD, PROVIDENCE AND FISHKILL RAILROAD
COMPANY.

(S R. I. 47.)

Interest on coupons.

Interest, by way of damages, is recoverable upon the overdue coupons or interest warrants of railroad bonds, from the time of demand and refusal of payment.

DEBT to recover the amount of certain coupons or interest warrants, secured by and attached to bonds given by the defendants to the plaintiff—the bonds not yet due. The coupons were payable, by their terms, at stated periods, and were all overdue at the time of suit brought. Prior to the suit, the plaintiff had demanded payment of the coupons; and payment being refused, now demanded interest on the same. Whether he was entitled to interest, and from what time, were the questions now submitted to the court.

Hayes, for plaintiff, cited *Spencer et al. v. Pierce et al.*, 5 R. I. 63, *Pierce v. Hall*, 1 N. H. 179; *Singleton v. Lewis*, 2 Hill, 408; *Doig v. Barkley*, 3 Rich. 125; *Gibbs v. Chispane*, 2 Nott & McCord, 38; *People v. New York*, 5 Cow. 331, 334; 1 Am. Lead. Cases, 493, and note, p. 522; *Hollingsworth v. City of Detroit*, 3 McLean, 472.

Chursey, for defendants.

 Whitaker v. Hartford, Providence and Fishkill Railroad Company.

I. Interest, purely as interest, never draws interest. *Hastings v. Wirwall*, 8 Mass. 455; *Wilcox v. Howard*, 23 Pick. 167; *Henry v. Flagg*, 13 Met. 64; *Doe v. Warren*, 7 Greenl. 48; 7 Conn. 57; 4 Johns. 235; *Childers v. Dean*, 4 Rand. 406; *Howard v. Bradley*, 1 App. 31.

II. The coupons are not expressed to bear interest. They contain no promise, are not notes, checks or due bills, nor of a like nature, nor subject to like rules.

III. I am aware of a few cases in apparent conflict with those cited, where interest by way of damages has been allowed on time notes bearing interest payable at stated intervening periods, but these were cases where both principal and interest were overdue. I know of no case where interest has been allowed on interest pure and simple, in a suit for the recovery of interest. In a recent case, supreme judicial court of Massachusetts, not yet reported because still depending on collateral matters, of *R. G. Shaw et al. v. Norfolk County Railroad Company*, on exceptions to the master's disallowance of interest on defendants' overdue coupons — precisely the present case — the court, after a full hearing, decreed "that no interest be allowed on any interest-coupons adjudged outstanding and entitled to the benefit and security of the mortgage." The hearing was before the whole court.

AMES, C. J. The suit is for the amount of the interest-coupons only, the bonds not being due. These, neither by their terms nor by custom, are payable with interest, but are to be presented for and given up on payment. Until presented, the defendants could have been in no default for non-payment; but after it, the coupons being due, the refusal to pay was a clear breach of the contract, and interest from the time of demand and refusal is recoverable by way of damages. Railroad bonds with interest-coupons attached, are purchased for investment and income, and when the latter is not paid at the time promised, no well considered authority, properly understood, forbids what principle requires, that the damage from delay of payment should be compensated by interest on the amount due, computed from the day of demand and refusal.

Harris v. The Social Manufacturing Company.

HARRIS V. THE SOCIAL MANUFACTURING COMPANY.

(41 R. L. 122.)

Arbitration and award.

When arbitrators are constituted by the parties the judges of the law, the facts and the equity of a case, their award will not be annulled if it appear that it is, within the terms of the submission, fairly construed, and furnishes a rule sufficiently certain to define and limit the rights of the parties, and under which those rights may be enforced—no mistake of law or of any material fact appearing on the face of the award, or by admission of the arbitrators, nor any partiality or corrupt conduct on their part, or misbehavior in the parties, being pretended.

DEMURRER to a bill in equity, seeking to annul an award of referees under a rule of the court of common pleas.

The bill set forth that a difference having arisen between the complainant and the defendant company as to the right of the defendant to maintain its dam to a certain height, to the injury of the plaintiff's mill privilege above on the same stream, they, under a rule of court, submitted the matter in dispute to arbitrators, who made a report and award to the court of common pleas, by which it was received and confirmed on the afternoon of the last day of its December term, 1860. It was admitted in the bill that no objection was made to the reception of the report by the plaintiff; but, in explanation, it was stated that he was not aware that the report was to be made until the afternoon on which it was confirmed, and that he was unable seasonably to find counsel and obtain advice as to his rights and duties. The several grounds upon which the plaintiff relied were also set forth in the bill, together with many details of the evidence submitted to the referees. These are presented, with sufficient fullness, in the opinion of the court.

R. W. Greene, for the plaintiff.

Currey for the defendant.

BULLOCK, J. This bill seeks to annul an award. The defendants demur to the bill, as presenting no case for equitable relief.

It is said the award should be annulled, as not conforming to the submission; that the submission called upon the arbitrators to

Harris v. The Social Manufacturing Company.

adjudicate upon the "present or other fixed height of the defendants' dam;" and that as this dam then had a fixed height, with no movable flash-board right, there was no authority, under the submission, in the arbitrators to award such a right.

There is no doubt that an award should, in all material points, pursue the submission. The parties agree as to what they will submit, and if the arbitrators adjudicate upon any matter or right not within the fair terms of the submission, their award, as to such matter or right, is a nullity and not binding. It is equally true that every reasonable intendment is to be made in favor of an award. It will be intended that the matter or right adjudged was submitted until the contrary appears. *Strong v. Strong*, 9 Cush. 564, 565.

In this case, the plaintiff and the defendants owned different water privileges upon the same stream. The defendants had raised their solid dam and flash boards. The plaintiff alleged that this was against right, and to the injury of his water privilege. These allegations the defendants deny; therefore they enter into an agreement to submit their respective rights to arbitration. The submission recites that disputes have arisen between the parties, and that they are desirous of amicably adjusting the same. They then agree that "their respective rights in the premises, and all questions in dispute between them, relating to this dam, be submitted to," etc.; and the arbitrators named, or a major part of them, are to decide upon the "respective rights" of the parties "at law and in equity." This is all of the submission material in this connection to be considered.

The submission is to be construed in the light of the admitted antecedent facts. What differences had arisen between these parties, which these arbitrators were amicably to adjust? What use of or control over this water privilege had the defendants previously exercised, claiming that right; and what injury did the plaintiff deem he had sustained in consequence? In 1841, the defendants maintained a solid dam to a level with the top of the "great rock" in the pond above, with fixed six-inch flash-boards, a portion of, and movable six-inch flash-boards the rest of the year. In 1855, they placed twelve-inch movable flash-boards upon this dam. In May, 1859, the defendants raised their solid dam twelve inches, and placed upon it twelve-inch movable flash-boards. In September, of the same year, this submission was entered into.

Harris v. The Social Manufacturing Company.

The right alike to raise their solid dam and place flash-boards thereon of an additional height, the defendants claimed and exercised. This right the plaintiff denied, and alleged as the injury, that it flowed out two feet of his fall. If raising the solid dam twelve inches was an injury to the plaintiff, calling for litigation, or the interposition of arbitrators, surely the placing of any flash-boards thereon was a greater injury, and an equally important subject for adjustment. And the plaintiff admits this when he alleges that not the solid dam alone, but both dam and flash-boards, flowed out two feet of his fall. Regarding the conflicting claims of the parties at the time this submission was entered into, and each and all of which was, in fact, the disputes which had arisen between them, and for the amicable adjustment of which this arbitration was agreed upon, and we think it would be hypercritical to adjudge that the word "dam," as used in this submission, means only solid or permanent dam; or that its language was not broad enough to cover, and was not intended to cover, each and every act done by the defendants, relating alike to the permanent and solid dam, and temporary or movable flash-boards, the consequence of which was to flow out any part of the fall above, as then claimed by the plaintiff.

Again, it is said the submission calls upon the referees to determine the "fixed height" of the dam, and that, therefore, they had no authority to adjudicate upon a movable flash-board right. But no such specific issue was submitted. The tenor and substance of the agreement upon this point was, that if the arbitrators determine that said dam can be maintained at its "present or other fixed height," then damages are to be awarded to the plaintiff, to be assessed in the mode indicated. This language is not mandatory, only so far as it relates to the mode in which damages are to be assessed, in a contingency that may or may not arise. If it touches the question of authority, it enlarges rather than limits the power of the arbitrators, since the language implies that they may or may not determine the question of "fixed height."

The award was, that the defendants "have the right to keep up and maintain the cap-log or permanent rolling way of their said dam to the height of the great rock in their pond, and no higher, and to keep on said cap-log flash-boards twelve inches wide, at all times, except in times of freshet."

The various obstructions the defendants had, from time to time,

Harris v. The Social Manufacturing Company.

erected upon this stream, damming up the water and causing it, as is alleged, to flow back upon the lands and water privileges of the plaintiff, and the claim of the defendants that these obstructions were rightfully erected and might be maintained, were the matters in dispute; and the main purpose of the arbitration was to determine, upon the principles of law and equity, whether this claim was well-founded, and, if not, what obstructions, in the way of damming up the water for the use of their mills, the defendants could rightfully erect. Construing the submission by its terms and subject-matter, and we do not see how we can avoid the conclusion that it authorized the arbitrators to adjudge as well upon the question of flash-boards as upon the question of solid dam.

A further objection to the award is, that it is wanting in certainty and finality. It is said that it adjudicates a contingent and conditional flash-board right in this, that it fixes no definite period of time or depth of water when the flash-boards may be maintained; that it does not determine the rights of the parties, or determines them so defectively that the award is incapable of being performed.

The rule no doubt is, that an award should be certain; that is, certain to a common intent, either in terms or by direct reference. Its language should be so unambiguous as to indicate what is awarded, and inform the parties of their rights and liabilities, and that which is awarded should be capable of being performed. If it be awarded that A. pay to B. \$100, this is good; but if it be added, subject to a certain allowance for labor, not fixing the value of the service, then it is bad, as uncertain. And so in *Hewitt v. Hewitt*, 1 Ad. & E. (N. S.) 111, where the award was that J. should, in a time fixed, pay to a banker named £3,121, and that, one month thereafter, R. should pay the same banker *such a sum* as would be sufficient to discharge a certain mortgage, the award was avoided.

The cases show that, while the rule as to certainty is not questioned, there has been a seeming contrariety of decision in applying the rule, and it is in reference to this that JERVIS, C. J., in *Mays v. Cannell*, *infra*, says, the cases upon the subject of award, "run very wild." In *Stonehewer v. Fana*, 6 Ad. & E. (N. S.) 730, where the arbitrators were to award upon the rights of the plaintiff in, and to regulate his enjoyment of, water upon a certain stream in a pure state, and the award was that the defendant should *take all proper and reasonable* precautions to prevent the water from being

Harris v. The Social Manufacturing Company.

rendered unfit for the plaintiff's use, directing a mode of filtering it, so as to cleanse it as far as it can be cleansed by the ordinary and most approved process of filtering, the award was held bad for uncertainty, WIGHTMAN, J., saying, "an award ought to be so express that there should be no difficulty or doubt as to the performance." In another leading case upon this point, where the question was one of the title to real estate and how possession should be delivered, and the arbitrators awarded that the defendant should pull down a brick wall forming an end of a long room which he had erected upon land of the plaintiff's lessor, or so much of it as stands four and a half inches, or *thereabout*, on the lessor's land and upon a certain wall or fence which divides the property of the lessor from that of the defendant, JERVIS, C. J., held the award sufficiently certain, and in delivering judgment, says we ought not to struggle to make an award uncertain, and that if upon any reasonable construction the award can be, it ought to be sustained, and that we may reasonably assume that there was a party wall between the property of the plaintiff's lessor and the defendant, and the direction to pull down the wall, or so much thereof as stood upon the land of the plaintiff, as near to the four and one-half inches as could be adjusted, was reasonably certain. *Mays v. Cammell*, 15 C. B. 107 (80 E. C. L.).

In *McDonald v. Bacon*, 3 Scam. 428, cited by counsel, the award was not only uncertain, but it did not pursue the submission, which called upon the arbitrators to determine, definitely, how much the defendant should lower his dam.

The case of *Lincoln v. Whittenton Mills*, 12 Met. 34, also cited, turned mainly upon the point that the award was not binding upon the parties in that suit, and it manifestly lacked both certainty and finality.

It is further objected to the award that it is not *final*, but leaves the rights of the parties undetermined and open to future litigation. It is true, the arbitrators do not determine what height of water upon that stream constitutes a freshet. But an award is not the less *final* because it does not execute itself, or preclude all future controversy between the parties. If an award leaves nothing to be done by either side, to carry it into effect, but the performance of some mere ministerial act, it cannot be objected to on the ground of want of finality. An award may not be final, in not adjudicating upon that which is submitted; but if what is submitted be

Harris v. The Social Manufacturing Company.

adjudicated, and not left open to future controversy, it is sufficient. It is no objection to an award, that litigation may ensue in enforcing it.

And the terms of an award must be governed, to some extent, by the subject-matter. If the right in dispute be in the nature of an *assumpsit*, the award should determine with accuracy what is due. But if the issue be upon conflicting water rights and movable flash-board rights, and how a dam may be harmlessly maintained at stages of water varying at different times of the day and seasons of the year, it is evident a like degree of certainty in defining the rights of parties is unattainable.

In view of the language of this submission, and of the subject-matter, we judge it to have been the purpose of the litigants to invest the arbitrators with equity powers to determine how far, and in what mode, this water power might be most fully and rightfully used by each, without injury or with the least injury to the other.

The question is not, whether the arbitrators determined, by mark or monument, when the flash-boards are to be removed; or, what height of water upon that stream constitutes a freshet; but have they laid down a rule, "regulation" or "direction," uniform and fixed, limiting and establishing, with reasonable certainty, the rights of the parties—one which may be observed, followed and performed. The term "*freshet*" is a definite term. Its meaning is known. It is not enough that witnesses may differ upon the question of freshet or no freshet. Witnesses differ upon all questions at controversy in courts. It is sufficient if there be a rule known to the parties, prescribing their rights, and which *may* be obeyed. *Strong v. Strong (infra)*.

Again, it is said the award is founded upon a "*plain mistake in law*." The rule is, that when parties, in express terms or by plain implication, submit both the law and the facts of a controversy, the decision of the arbitrators is final and conclusive, and the award becomes in the nature of a judgment of a court of the last resort. There is an exception to this rule, when a plain mistake in the law appears on the face of the award. In such a case, the arbitrators undertake to decide according to law, and the award shows they have not so determined. And so of a plain mistake in fact, where the mistake appears upon the face of the award. But such mistake should not only thus appear, but be a mistake so affecting the principle upon which the award is made, and so plain and material, that

Harris v. The Social Manufacturing Company.

if the arbitrators had been apprised of it before making their award, they would have awarded differently. Mere error of judgment is no ground for setting aside an award; neither, that the arbitrators have drawn, apparently, wrong conclusions from the facts or evidence.

In this case, the submission referred all questions in dispute relating to the defendants' dam, touching the respective rights of the parties, to the determination of the arbitrators, to be decided upon the principles of law and equity. The submission is broad. We are bound to presume such was the intent of the parties. The arbitrators are to determine, not only what was testified to, but what that which was testified to proved. They were not only to decide the law of the case, but to apply the law to the proof. And more than this: if they saw that a strict application of technical law failed to do complete justice between the parties, taking into view all the circumstances of the case, they had the right, in furtherance of the ends of justice, to invoke the aid of the more flexible, but not less established rules of equity.

It is admitted by the bill that the parol agreements therein referred to, relating to the rights of flowage, and the various grants, and the evidence upon the questions of license, were all before the arbitrators. We must presume they considered them all, heartily and intelligently; that they construed these agreements and grants, weighed the testimony upon the question of license; examined how far these agreements and grants amounted to a waiver of the provisions of the mill act, and estopped the rights of the defendants. It is not enough that the evidence was not satisfactory to the parties. It is sufficient, under this submission, if it was satisfactory to the arbitrators.

The arbitrators having been made, by the parties, the judges of the law and of the facts and of the equity of the case, and no mistake of law appearing upon the face of the award, and no mistake as to any material fact thus appearing or being admitted by the arbitrators; and no partiality or corrupt conduct on their part, or misbehavior in the parties being pretended; and the award being within the terms of the submission, fairly construed, and furnishing a rule sufficiently certain to define and limit the rights of the parties, and under which these rights may be enforced; we see no sufficient reason in the plaintiff's bill for annulling the award or any part of it.

It is unnecessary to consider the question of "*accident*," by which,

Taylor v. Staples.

as he alleges, the plaintiff was deprived of a hearing at law, since every ground of exception to the award has been fully and ably presented by counsel under this *demurrer*.

The demurrer, therefore, is sustained, and the bill dismissed with costs.

TAYLOR, Executor, *et al.* v. STAPLES *et al.*, Trustees.

(8 R. I. 170.)

Specific performance of voluntary agreement. Cloud on title.

As a general rule, a court of equity will not enforce a voluntary agreement, or perfect a merely promised or imperfect gift. There is *locus penitentis*, as long as it is incomplete.

Where the evidence adduced in support of a bill, for the specific performance of an alleged agreement to convey an estate, is adjudged by the court to show merely an intent on the part of a wealthy father, while in life, to give to his son that estate, which intent the father, from forgetfulness or some other cause, never executed, the bill will be dismissed with costs.

A father, possessed of great wealth, makes upon his account book an entry to the credit of a son, in these words: "By further allowance to pay for house, etc., \$5,000;" and long after the death both of father and son the legal representatives of the son, by suit in equity, seek to recover from the legal representatives of the father the said sum, with interest from the date of said entry (May 30, 1837), *Held*, That the entry is but an indication of an intention on the father's part, and not a promise founded upon a consideration cognizable by a court of equity,—neither the fact that the father had trained up the son in idleness, as the heir presumptive of inexhaustible wealth; nor the fact that this "allowance" was consistent with a "family arrangement," existing at the date of said entry; nor the fact that, unless this claim of \$5,000 and interest were allowed and paid, would this son receive of his father's accumulations so much as was received by his brothers and sisters respectively, constituting a valuable consideration, upon which alone the court must act, unheeding a consideration merely "moral" or "meritorious."

A court of equity will not interpose to remove a cloud from the title of an estate, held by possession for twenty years or more under the statute of possessions, for the reason, among others, that the complainant has at law a remedy entirely adequate to his protection.

SUIT in equity. The facts of the case, and the points raised and discussed by counsel, are sufficiently detailed in the opinion of the court.

Taylor v. Staples.

T. C. Greene, with whom was *R. W. Greene*, for the complainants, cited, to the point that the gift of the estate, under the circumstances in proof, was a valid gift, 2 Story's Eq. Juris. 761; *Eaton v. Whitaker*, 18 Conn. 222-229; and, as bearing upon a title by adverse possession, Angell on Limitations (3d ed.), 490, § 396; *Draper v. Shute*, 25 Miss. 204; *Hole v. Rittenhouse*, 37 Penn. 116.

Parsons, with whom was *Blake*, for the defendants, cited, to the point that the complainants had unreasonably delayed to prosecute their pretended claim, 2 Story's Eq., § 959 a, and 1525, note; 1 Daniel's Ch. Pr. 622 and notes; *Pratt v. Vattier*, 9 Pet. 405, 416, *et seq.*; *McKnight v. Taylor*, 1 How. 167; and as to the requisites to a valid gift, *Antrobus v. Smith*, 12 Ves. 39; *Remington v. Gittings*, 2 Gill and Johns. 208; 7 Johns. 26; 18 id. 145; 2 Esp. 663; 2 Kent's Com. 438.

DURFEE, J. This bill is brought by the representatives and devisees of the late William Bradford D'Wolf against the trustees of the residuary estate of the late James D'Wolf, the father of said William Bradford, and against the administrator, with the will annexed, on the estate of said James D'Wolf. It prays that the defendant trustees may be decreed to release and quit-claim to the complainant devisees a certain lot of land, with the house and improvements thereon, situate in Bristol and described in the bill; and also pay to the other complainants the sum of one thousand dollars, with interest from October in 1837, or, in the alternative that this decree is refused, to pay over to the complainants, last named, the sum of \$5,000, with interest from October in 1837. One of the grounds,—and the chief ground on which the complainants claim the relief prayed for,—is two entries made in the ledger of said James D'Wolf, in his account with said William Bradford, and in his own handwriting. One of these two entries, which is on the debit side of the account, under date of October 19, 1837, is as follows, to wit: "To house and lot per deed, with cost of stable, etc., \$4,000;" the other, on the credit side, under date of May 30, 1837, is as follows, to wit: "By further allowance, to pay for house, etc., \$5,000." The account consists of many other items, some preceding and some following these two entries, all of which are in the handwriting of Byron Diman, who was the confidential clerk of James D'Wolf, and who testifies that

the two entries not in his handwriting were made by James D'Wolf, both at the same time, and some time in the latter part of October, 1837, though he cannot state the precise day. He also testifies that the house and lot designated in the entry on the debit side of the account was the house and lot described in the bill, and that it was then occupied by William Bradford D'Wolf. The complainants have also put in testimony going to show that William Bradford continued in the occupation thereof till the death of his father in December, 1837, when he removed to the homestead, so called; and that, afterward, during some years at least, he let the house and lot and collected the rents, and was at the expense of keeping the same in repair. And from these facts, taken in connection with the entries, they infer an agreement on the part of James D'Wolf with William Bradford D'Wolf to convey to the latter the house and lot in question, and contend that this agreement, having been partly performed by the possession allowed to William Bradford of said house and lot, and by his reparation thereof, is of such a character that, though not wholly in writing, it can be and ought to be specifically enforced.

The complainants, to further strengthen their case, show that William Bradford was the youngest of four sons who survived their father; and they allege, and appeal to the ledger of James D'Wolf to prove, that his gifts and allowances to his other sons were much larger in amount than the sums allowed to William Bradford; and, also, they allege that it was the intent of James D'Wolf, in consideration of his gifts and allowances to the other sons, to have conveyed to William Bradford the house and lot in question—the gifts and allowances to each son being made with reference to, and in consideration of, the gifts and allowances made to the other sons—and that the deed was never executed, through mistake or forgetfulness. This allegation is not admitted by the answer, and is supported by little except its intrinsic probability.

Can we, on the case thus made, grant the complainants the relief they seek? Can we compel the defendants to convey to them the house and lot debited to William Bradford? The defendants say there is no consideration for such a conveyance, and that therefore we cannot compel it. The complainants answer, that the possession and reparation of the house and lot by William Bradford is a sufficient consideration. Is the answer correct? Since the death of James D'Wolf, William Bradford has been in possession of the

Taylor v. Staples.

house and lot only as landlord, enjoying the rents and profits, and does not appear to have laid out in repairs on them more than enough to keep them in a condition to yield rents and profits. His relation to the house and lot has, apparently, been no detriment to him, and no benefit to the estate of James D'Wolf, and it does not, therefore, present the usual characteristics of a valuable consideration. Furthermore, there is no evidence that William Bradford ever came under any obligation to his father to continue to retain and repair the house and lot if his father would convey them to him, or that his doing so was not purely a matter of choice. But of course a consideration—if such it may be called—which is to follow an agreement, and which it is optional with the party to be benefited by the agreement to furnish or not, is not a consideration in any legal sense of the term. And, indeed, the idea that there was to be any consideration for the house and lot does not appear to have entered the minds of either father or son. On the contrary, so far as William Bradford is concerned, his own son—whose deposition the complainants have put into the case—testifies that he has “often heard him (William Bradford) say that his father (James D'Wolf) gave him the house and lot.” We think this statement was correct, except that William Bradford denominated that a gift which, though promised or intended, was never effectuated as such. We are of the opinion that James D'Wolf, when he made the entries in his ledger, meant to give, by deed, to William Bradford the house and lot debited to him, and that he subsequently omitted—probably through forgetfulness—to carry his intention into effect.

Can we supply the omission? There can be no doubt that, as a general rule, a court of equity will not enforce a voluntary agreement, or perfect a merely promised or imperfect gift. “There is no case,” says Sir WILLIAM GRANT, M. R., in *Autobus v. Smith*, 12 Vesey, Jr. 39, “in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect. There is *locus poenitentiae* as long as it is incomplete.” This doctrine is recognized and applied in numerous cases, some of which present full as strong claims for relief as this does, and that too without the delay in prosecuting them which is so marked a feature of this. *Tate v. Hibbert*, 2 Vesey, Jr. 112; *Ward v. Turner*, 2 Vesey, Sen. 431; *Pennington v. Gittings*, 2 Gill & Johns. 208; *Thompson v. Dorsey*, 4 Md. Ch. Dec. 149; *Hitch*

v. *Davis*, 3 id. 286; *Edwards v. Jones*, 1 My. & Cr. 226; *Dillon v. Coppin*, 4 id. 647; *Meek v. Kettlewell*, 1 Hare, 464. The rule has, indeed, been qualified in some cases, in order to give effect to a voluntary assignment of a chose in action or an equitable estate, where the assignor had done all he could to divest himself of the property; but even in these cases the rule is admitted to hold good where there is no obstacle to the direct transfer of the legal title. *Kekewick v. Manning*, 1 De Gex, Mac & Gord. 176; 12 Eng. L. & Eq. 120, and cases there cited, *Voyle v. Hughes*, 23 id. 271; but see, also, in the Am. Law Reg. of May, 1853, a criticism strongly impugning the authority of *Kekewick v. Manning*. A further qualification of the rule was attempted by Sir EDWARD SUGDEN, who held, in *Ellis v. Nimmo*, 1 Ld. and Goold, 333; 10 Cond. Ch. R. 534, that a voluntary contract in writing, by which a father undertook to provide for a child, should be enforced, being founded on a meritorious consideration; but this decision has been discredited by later English cases, and, at least where the contract is sought to be enforced against others equally meritorious, directly overruled. *Holloway v. Headington*, 8 Sim. 325; *Dillon v. Coppin*, 4 My. and Cr. 647; *Jeffreys v. Jeffreys*, 1 Cr. & P. 138; 2 Story Eq. Jur. 793 b. 989, 1040 c; *White & Tud. L. C. 244*; *Lewin on Trusts* (97 Law Lib.), 99. In this country there are cases which hold that a voluntary agreement or promise may be enforced in equity in favor of a wife or child, when under seal, which imports a consideration and renders it valid at law. *Caldwell v. Williams*, 1 Bailey's Eq. 175, 176, and *McIntyre v. Hughes*, 4 Bibb. 186, cited in *White & Tud. L. C. 247*; but if not under seal, it is held the contract will not be enforced. *Pennington v. Gittings*, 2 Gill & Johns. 208, 217; *Fink v. Cox*, 18 Johns. 145, 149; *Carpenter v. Dodge*, 20 H. R. 595. Considering, then, the entry relating to the house and lot as the proof of an intended gift, or promise to give, we do not think we can enforce it, unless there be some reason to make it an exception to the ordinary rule.

The complainants contend that such a reason exists, in the fact that William Bradford was so long in possession of the property, and had spent his money in repairing, on the faith of the entry debiting him with it, and that it would now be inequitable to withhold the title by deed which his father meant him to have. There would be great force in this argument, if it were the fact that Wil-

Taylor v. Staples.

liam Bradford had laid out in repairs more than he had received in rents, and could only be reimbursed by a conveyance of the property itself. But this is not the case, for it appears by his own book of accounts that the sum of all his expenditures of this kind, from 1840 to 1861, does not exceed \$309, being an average of only about \$15 per annum, while the rents of the place during the same period have varied from \$90 to \$200 per annum. It is not necessary, therefore, that the place should be conveyed to his devisees to protect them from loss. And even if his expenditure has exceeded his receipts, it would not follow that equity could be done only by such a conveyance. We are not without authorities bearing directly on this point. Thus in *Pinckard v. Pinckard*, 23 Ala. R. 649, where a father gave his son, by a parol gift, land worth \$200, which the son occupied for ten years, and which, during that time had doubled in value, the court refused to compel a conveyance. So in *Adamson v. Lamb*, 3 Blackf. (Ind.) 441, it was held that a gift by parol of real estate from father to son—the donee being in possession and having made improvements—vests in the son no interest which a court of law or equity can execute. And see also *Black v. Curd*, 2 Gill & Harr. (Md.) R. 100; *Jones v. Tyler*, 6 Mich. R. 364; *De Veaux v. De Veaux*, 1 Strobbh. Eq. 283; *Jackson v. Rogers*, 1 Johns. Cas. 33; 2 Caines Cas. 314. And in *Rucker, etc., v. Abel*, 8 B. Mon. (Ky.) R. 566. a parol gift from father to son, of land, on which the son entered and made valuable improvements, was decided to be so entirely inoperative, that it could not be afterward affirmed by the deed of the father, when in failing circumstances, as against his creditors, though it was held that the son was entitled to a lien on the estate for the value of his improvements. See *Boyer v. Davis*, 14 Tex. R. 331. In fact, the only authority that we find in favor of the view of the complainants, is certain cases decided in Pennsylvania under its mixed system of law and equity, in which it has been held that a parol gift of land, followed by possession and valuable improvements on the part of the donee, should be specifically enforced in analogy to the specific performance of verbal contracts for the sale of land which have been partly performed, and on the ground that the donee would otherwise be defrauded. *Syler v. Eckhart*, 1 Binney, 578; *Young v. Glendening*, 6 Watts, 509; *Burns v. Sutherland*, 7 Barr, 103. The obvious fault of these latter decisions is, that for the sake of doing more than justice to the donee, they do a great injustice to the donor. An inchoate gift, by

its very nature, leaves to the donor a *locus poenitentiae*, or right to change his mind and revoke or modify his gift — a right which the exigences of his fortune or family may make it perfectly proper for him to exercise. Of this right the donee or expectant donee must be presumed to be apprised. In the absence of actual fraud, then, there is no more reason, in the eye of the law, that the donor, who has not completed the gift, should lose his land, than that the donee, who has been expecting to have the gift completed, should lose his improvements. The just claims of both parties ought to be protected, and the case of *Rucker, etc., v. Abel*, shows how, by making the value of the improvements a lien on the land, this can be accomplished. In this case it is doubtful if there have been such valuable improvements as even, under the Pennsylvania decisions, would entitle the complainants to a deed of land; but we are clearly of the opinion that it ought not to be decreed in their favor, under the law, as we deem it to be more correctly declared in the other cases above cited.

If, for these reasons, we cannot decree a release of the house and lot to the complainants, can we, with any more propriety, decree a payment to them of the \$5,000 with interest, as prayed for in the alternative prayer of the bill? This payment is asked for by reason of the entry, which, as before stated, reads as follows: "By further allowance to pay for house, etc., \$5,000." The entry speaks of the \$5,000 as an allowance. But the term "allowance" is ordinarily only another name for a gift or gratuity to a child or other dependent. Is there anything to show that in this case something different was meant? The counsel for the complainants says that James D'Wolf brought up his sons to rely exclusively on him for support; that his account with William Bradford shows that William Bradford was so brought up; and he argues that the habits and expenditures, in which he was thus encouraged, constitute a consideration for this allowance on which the court will act. Undoubtedly, if a father so brings up his children, he ought, morally speaking, not to leave them without proper provision; but we do not think a moral duty of this kind can be converted into a valuable consideration for a specified promise or agreement. The counsel also says the entry was made to carry out a family arrangement, and with reference to and in consideration of the large gifts and allowances granted to the other sons; and that for this reason the payment ought to be decreed. This argument is, we think, put

rather more strongly than the evidence warrants. It is not in proof that James D'Wolf had formed any single or settled plan to advance or assist his sons, by *equal* gifts and allowances during his lifetime, or that, having carried out such a plan in regard to the other sons, he made these entries with the intention of doing the same by William Bradford, and failed of so doing by accident or mistake. The most that is proved is, that some of the sons had profited less by the bounty of their father than others, and if the claim of the complainants be correct, William Bradford the least of any; and that in this state of things James D'Wolf made the two entries. He may have been prompted in making them by a desire to deal equally by his sons, or he may have been prompted by a regard to the special wants and necessities of William Bradford. We know not what the motive was; but supposing that which is most favorable to the complainants, it then follows that the entries were made in compliance with the duty or dictates of paternal impartiality. If such were the motive, it was a praiseworthy one; but it does not, in the eye of the law, amount to a valuable consideration. It is of that class which jurists term moral, or, at best, meritorious, as distinguished from valuable considerations. But, as we have seen, in the absence of a valuable consideration, the court does not act, and no such consideration appearing here, we must refuse the relief prayed for in this aspect of the case.

But the complainants, devisees of William Bradford, seek relief on still another ground. They allege that they have acquired a title to the house and lot described in the bill by twenty years' adverse possession; that the defendants, trustees of the residuary estate of James D'Wolf, claim the house and lot as a part of said estate, whereby a cloud is thrown upon their title; and they, therefore, ask that said trustees may be decreed to release or quit-claim the house and lot to them. Before we inquire whether they have such a title, which is denied in the answer, it will be well, first, to determine whether, if they have, it will entitle them to the relief they seek. Their counsel claims that, having jurisdiction of the subject-matter of the suit on other grounds, we may proceed to give relief on this ground also. Unfortunately for this view, we have already decided that the other grounds are untenable, and, accordingly, if we grant the relief at all, we must grant it on this ground alone. The suggestion of the

Mauran v. Smith.

bill is, that the claim of the defendants, under the old title, is a cloud on the newly-acquired title, such as the court will remove. No precedent is cited in support of this view. Is it maintainable on principle? The reason why a court of equity relieves against a deed or other writing, which, being invalid or extinguished, exists only as a cloud on the title to which it relates, is the danger of future litigation after the evidence of its invalidity or extinguishment has, by lapse of time, been lost or impaired. 2 Story's Eq. Jur. § 705. But this reason does not hold, where the title supposed to be clouded is a title by possession, and the supposed cloud is a claim under the former title; for, in such a case, the evidence of the extinguishment of the former title, instead of becoming impaired or lost, is continually strengthening, by the lapse of time. In fact, it is the lapse of time, in concurrence with the other statutory requirements, which effects the extinguishments, and it cannot endanger the new title, of which it is the principal constituent. We think, therefore, that if a party has acquired another's land under the statute of possessions, he ought to be content with the title which the statute gives him, and that he cannot, without some further equity, reinforce it by coming into chancery, to compel a release of the title which he has superseded. The remedy which such a party has at law is entirely adequate to his protection. *Wolcott v. Robbins*, 26 Conn. 235. Whether, then, the complainants have the title by possession or not, we think they cannot have the relief which they seek, and that consequently their bill must be dismissed with costs.

MAURAN, Adjutant-General, Relator, v. SMITH, Governor, Commander-in-Chief, etc., of the State of Rhode Island.

(S R. I. 192.)

Mandamus to Governor.

A writ of mandamus is not issuable from the supreme court to the governor of the State, to direct him, as commander-in-chief, to perform a duty which is properly within the sphere of his duties as commander-in-chief, though the same is imposed upon him by a statute of the State.

Mauran v. Smith.

THE relator was elected adjutant-general of the State, in 1861, for a term of five years, and continued in the discharge of his duties until September, 1865, when the governor, in writing, requested him to resign, which he declined to do. The governor thereupon revoked his commission, and directed him to deliver the books and papers of his office to the successor named. The relator thereupon demanded to be informed of the cause of his removal, and to be tried by a court-martial. The relator was thereupon placed in arrest, and now alleges that since that time he has remained in arrest, and no charges have been preferred against him, and no court-martial has been ordered for his trial, and he is thereby disabled from discharging the duties of adjutant-general; that by the law of the State it is provided that general, field, commission and staff-officers shall be subject to trial by court-martial, according to the usage and practice of war; that the arrest and detention of petitioner was contrary to the usage and practice of war; that by the articles of war of the United States it is provided that "no officer or soldier who shall be put in arrest or imprisonment shall continue in his confinement more than eight days, or until such time as a court-martial can be conveniently assembled;" and that there was no impediment to the convening a court-martial within that time.

The respondent, among other answers to the petition, denied the jurisdiction of the court in the premises.

Pitman, Payne & Currey, for the relator, cited Benn. Cts. Mar. 350; Dig. of Op. of Judge Adv. (1865) 62; McComb on Cts. Mar. 60; *United States v. Guthrie*, 17 How. 284; *Kendall v. Stockton*, 12 Pet. 836.

King and Blake, for respondent.

DURFEE, J. The first question in this case is, whether the writ of mandamus lies to compel the governor of a State to perform an official duty. The question is not a new one in the courts. In Arkansas, *Hawkins v. The Governor*, 1 Pike, 570; in Georgia, *Lane v. Towns*, 8 Ga. 360; in Illinois, *People v. Bissell*, 19 Ill. 229, and in New Jersey, *State v. The Governor*, 1 Dutch. 331, it has been decided that the writ does not lie in such a case. In Texas, *Houston, etc., R. Co. v. Randolph*, 24 Tex. 317, if the U. S. Digest, vol. 21, p. 372 may be trusted, it has been held that the writ does not lie to any

Mauran v. Smith.

member of the executive department, except the land commissioner. In Maine (*Dennitt, Petitioner*, 32 Me. 508), the court refused to issue the writ to compel the governor and council to perform a statutory duty, but for reasons which would have led to its refusal if sued for against the governor alone. In Minnesota (*Chamberlain v. Sibley*, 4 Minn. 309), the court refused to issue the writ to compel the governor to perform a duty prescribed by the constitution, but delivered a dictum to the effect that the writ would lie to compel the governor to perform a duty prescribed by statute, and which might be performed as well by one officer as another. In Missouri, in the case of the *Pacific R. R. Co. v. The Governor*, 23 Miss. 353, the question was much discussed, but the court expressly refrained from giving an opinion upon it. On the other hand, in Ohio (*State of Ohio v. Chase*, 5 Ohio, N. S. R. 538), it was held that a writ of mandamus may issue to compel a governor to perform a mere ministerial duty enjoined on him by statute, and which might have been devolved on another officer of the State; though in that case the writ was not issued, for reasons aside from the question of jurisdiction. In North Carolina (*Cotton v. Ellis*, 7 Jones, N. C., 545), the court decided in favor of the jurisdiction, and, for anything that appears, issued the writ; being the only instance which we find reported, in which the writ may have issued against a governor, except where he consented to the jurisdiction, for the sake of getting the opinion of the court upon the merits of the relation. These are all the cases which we find bearing directly on this point, and, from the course of decision in them, it is apparent that the weight of authority is against the jurisdiction.

One reason which has been suggested for refusing the writ, is that, if granted, it would tend to provoke a conflict between the judicial and executive branches of the government—a conflict in which the judiciary would prove the weaker party. Of course, in a case where the jurisdiction is clear, such a consideration could have no weight; but where the jurisdiction is problematical, the consideration affords a presumption which it would be unwise to disregard. “For,” as Blackstone has remarked, “all jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it.” (1 Shars. Bl. Com. 242.) And in this connection it is worthy of note that in England, from which we derive the process,

Mauran v. Smith.

not only is the king exempt from it, but, among the judicial tribunals, the higher courts of judicature enjoy a similar immunity.

But the reason which has been most effectual in determining the courts to refuse the writ is that which is drawn from the division of the powers of government under our State constitutions into three co-ordinate departments, legislative, executive and judicial, each independent of the others, except in so far as it is subordinated to them by the constitution. This division is coeval with the States themselves, and has always been deemed an indispensable safeguard of republican liberty. Mr. Madison, in the forty-seventh paper of the *Federalist*, traces the idea on which the division is based to Montesquieu, who borrowed it from the British constitution, and who taught that civil freedom cannot coexist with a union of the three powers in the same hands. The analysis of government into three powers is, however, as old as Aristotle, who (if we may trust Taylor's translation) recognizes the "three parts of all politics," and says, "where these subsist properly, the polity must necessarily be in a flourishing condition." *Pol. b. iv, ch. 14. et seq.*, Taylor's *Trans.* It was the merit of Montesquieu to develop the necessity, for the security of civil liberty, of a separate department for each of the powers, as it was his good fortune to find a multitude of disciples ready to receive his doctrines. His book appeared in 1748, and at once became the hand-book of political philosophy for the more enlightened statesmen of both the Old and New World. The doctrine was, to some extent, though less systematically, produced in Blackstone's *Commentaries*, which appeared a few years later than "*The Spirit of the Laws*;" and it so became familiar in its practical aspects and import, not only to the more learned publicists, but to every lawyer in the land. 1 Shars. Bl. Com. 147, 269. Accordingly, when the American colonies threw off the yoke of the mother country, and formed new governments to suit themselves, they generally, if not universally, made this division of power, except as expressly qualified, a fundamental principle of their constitutions, and in many, if not in nearly all of them, guarded each department from encroachments by explicit inhibitions. Daniel Webster, speaking of this subject in another relation, has said, "a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions, and, doubtless, the con-

tinuance of regulated liberty depends on maintaining these boundaries." Webster's Works, vol. iv, p. 122.

The question then is whether, in view of this principle, it is competent for the court, by a writ of mandamus, to compel the executive to do an official duty, which he delays or declines to do of his own accord? It is admitted that wherever, within the sphere of his duties, the executive has a discretion, he is amenable for refusing to perform them, not to the court, but only to the senate on an impeachment, or to the people at the polls. But where the duty to be performed is merely ministerial, it is claimed that a different rule obtains, and that the court may compel him to perform it. If this be true, then, to the extent of his ministerial duties, the executive is not the co-ordinate of the judiciary, but subordinate to it, and the line of separation between the two departments is, to that extent, obliterated. Of course such a deviation from constitutional principle is admissible only in favor of some other principle of higher obligation. But the only principle adduced in support of the deviation, is the principle of the common law, that for every wrong there is a remedy. Evidently that is not enough; for a principle of the common law cannot override a principle of the constitution. Consequently we find it admitted, even in cases which hold that a writ of mandamus is issuable to the governor, that it will not issue to enforce a duty which is enjoined on him by the constitution, or which he alone can perform, but only to enforce a *statutory* duty, which might as well have been devolved upon any other individual, the theory being that, as to such a duty, the governor is on the same footing as any other individual who might have been designated to perform it.

The distinction, however, between these two classes of duties, which is thus recognized by some of the cases, is, by others of them, either ignored or expressly repudiated. In this case it has been urged as applicable in favor of the relator, and its validity has consequently been much discussed. But whether the distinction be valid or not, we deem it necessary to determine; for the duty which we are here asked to enforce, though prescribed by statute, could not have been properly devolved on any one but the defendant. It is a duty to see that charges are preferred against a military officer, and that a court-martial is convened for his trial, to consist of the highest military officer in the State except the defendant, and of several other officers of superior grade. To confide such a duty to

any one except the commander-in-chief would be an extraordinary transgression of military usage; and, in a time of actual service, might occasion the most embarrassing, if not fatal disorders.

In this aspect of the case, however, the counsel for the relator argues that the decisions which might have been cited are not applicable at all as authorities, for the reason that they were decisions in cases where the writ was sued for to compel the governor to perform a civil or political duty; whereas, in this case, the writ is sued for, not against the governor as such, but against the commander-in-chief, to compel him to perform a military duty. The idea is, that the office of governor is separable from that of commander-in-chief, and that while, as a civil magistrate, the governor may be exempt from the writ, as commander-in-chief he is subject to it. We do not think the constitution warrants any such discrimination. The constitution declares that "the chief executive power of this State shall be vested in a governor," and, in a subsequent section, declares that the governor "shall be captain-general and commander-in-chief of the military and naval forces of this State." In this respect it is similar to the constitutions of the other States, and to the constitution of the United States, which again is similar to the British constitution, under which the king is the generalissimo, or the first in military command in the kingdom. 1 Shars. Bl. Com. 262. The supreme military command is thus universally recognized, in all governments professing a separation of the three powers, as a portion of the chief executive power. See 1 Kent's Com. 5th ed. 282. Indeed, in time of civil convulsion, it is the most important portion of that power. Supreme military command is in fact implied necessarily in the grant of the chief executive power. The mere fact, then, that the governor, in his different capacities, is designated by different titles, does not sever the unity of his office. When inaugurated, he takes but a single oath, which binds him in all his functions. If impeached and deposed, the sentence of deposition would deprive him of all his functions, whether impeached for a misdemeanor committed as commander-in-chief, or as a civil magistrate. But if, under the American system of government, the supreme military and civil authority is thus inseparably united in the governor, then he is no more subject to the control of the judiciary in the one capacity than in the other. We think, therefore, that the discrimination suggested by the counsel for the relator is inadmissible.

But in reply to all this line of reasoning, it is reiteratively urged that if in this case the writ of mandamus does not lie, then the relator is without redress, and the great maxim of the law, that for every wrong there is a remedy, is egregiously falsified. This is an argument to which no court of justice can be insensible. It cannot escape remark, however, that the maxim which is quoted comes to us from England, where it is subject to the same exception in favor of the king, which is here claimed in favor of the governor. Indeed, it is one of those maxims which must, from the nature of things, be understood with some qualification. If, for instance, it were decided that the governor is amenable to the writ, the court might, nevertheless, unjustly refuse it, and there would then be no remedy for the wrong, except that which is as applicable to the governor as to the court, to wit, the remedy by impeachment. The answer which naturally occurs to this is, that it is not to be presumed that the court will be guilty of such an injustice. But since this presumption must be made somewhere, why should it not be made in favor of that branch of the government on which the duty to be performed is primarily imposed, as readily as in favor of its co-ordinate? Such a presumption, however, inapplicable to an inferior officer, does not seem inappropriate to a magistrate who is clothed by the constitution with the supreme trust of taking "care that the laws be faithfully executed," and who is privileged, in the execution of his office, to consult the judges of this court as his legal advisers.

We think, therefore, that the court has no jurisdiction to issue its writ of mandamus to compel the defendant to perform the duty which in this case he is alleged to have disregarded.

Of course, in coming to this conclusion, we unequivocally admit that the governor of a State is amenable to the court, like any other person, for his private acts, or for any act not properly within the scope of his office, though done under the color of his office.

But though we think the application ought to be dismissed for want of jurisdiction, we deem it not improper to say that, even if we had jurisdiction, we should not deem this a case for granting the writ, at least in a peremptory form. A writer on the law of mandamus says: "It is an imperative rule of the law of mandamus, that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must

Mauran v. Smith.

have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms, or by conduct from which a refusal will be conclusively implied." Tapping on *Mandamus*, p. 282, cited in *People v. Romero*, 18 Cal. 89; and see *Rez v. Brecknock*, 3 Ad. & El. R. 217, and the cases cited for the defendant. Now, in this case there has been no express refusal, and no conduct which is conclusively equivalent to a refusal. The defendant sets forth, in his answer, that when requested to perform the duty which we are asked to enforce, he replied that he had the matter under consideration. But the relator claims that to hold the matter under consideration, as the defendant did, for twenty-one days prior to this application, was a virtual refusal. He contends that the defendant, by the statute, was bound to proceed "according to the usage and practice of war," which, he says, means according to the "rules and articles of war," as established by act of congress; and he shows that, according thereto, an officer who has been put under arrest must be served with a copy of the charges on which he has been arrested, "within eight days thereafter," and "be brought to trial within ten days thereafter, unless the necessities of the service prevent such trial," etc. He accordingly argues that the defendant, having exceeded the limit of the discretion allowed by this article, has virtually refused to comply with the relator's request. And if it were true that the statute, when it speaks of "the usage and practice of war," means the "rules and articles of war," there would be great cogency in the argument.

But it is demonstrably certain that such is not the meaning of the statute. As we have seen, the rules and articles prescribe, subject to the exception of necessity, that an officer who has been arrested shall be served with a copy of the charges within *eight* days, and brought to trial within *ten days*, after his arrest. But our statutes (Rev. Stat. chap. 242, § 11) provide that the officer under arrest shall be served with a copy of the order for the court-martial and a copy of the charges against him "twenty days before the sitting of said court," thus making it utterly impossible to meet the requirement of the "rules and articles of war," that he shall be "brought to trial within ten days" after his arrest. This puts it beyond question that, in this respect, at least, the phrase, "usage and practice of war," employed in the statute, does not mean the "rules and articles of war." But if this be not meant,

then the question recurs whether the defendant, in holding the relator's request and the matters involved in it under consideration for twenty-one days, has exceeded the large discretion vested in a commander-in-chief, "according to the usage and practice of war," and consequently may be adjudged to have refused to comply with that request. We are not ready to adopt that conclusion, and could not, therefore, in the present aspect of the case, even if we thought we had jurisdiction, consent to grant the writ—certainly not in a peremptory form. But with a view which we hold of the question of jurisdiction, of course we cannot assent to the issuing of the writ in any form, either peremptory or alternative.

The application must therefore be dismissed.

NOTE.—The governor may, by mandamus, be compelled, like other public officers, to perform an act clearly defined and enjoined by law, and which is merely ministerial in its nature, and neither involves any discretion nor leaves any alternative. *Pacific Railroad v. Governor*, 23 Miss. 353; *Chamberlain v. Sibley*, 4 Min. 309; *Collen v. Ellis*, 7 Jones' Law (N. C.), 545; *State v. Governor*, 5 Ohio St. 529; *State v. Magill*, 5 Ham. (O.) 358.—REF.

WADE v. CHAFFEE.

(6 R. I. 234.)

Arrest without warrant. Pleading.

A constable or police officer is not bound to procure a warrant, before arresting a person whom he has probable cause to believe guilty of a felony, even though there may be no reason to fear the escape of such person in consequence of the delay in procuring the warrant.

A plea justifying an arrest on suspicion of felony, without a warrant, should set forth the grounds of the suspicion, so that the court may judge of them, and determine whether they afford probable cause or not.

THIS was an action of trespass, for assault and battery and false imprisonment, alleged to have been committed at Providence on the 23d of August, 1864.

Plea, in substance, that at the time when, etc., "a complaint had been made to the then acting city marshal of the city of Providence, that there had been feloniously stolen, taken and carried away from a certain room, to which no one but the occupant (the plaintiff) had access, a large sum of money, to wit, the sum of thirty-three dollars; whereupon the said city marshal directed the defendant, who was

Wade v. Chaffee.

then and there a police officer of said city of Providence, to look up this affair, and to apprehend the person suspected of said crime. Wherefore the said defendant, having good and probable cause of suspicion, and vehemently suspecting the said plaintiff to have been guilty of, or concerned in, the stealing and carrying away of said money, and to have feloniously taken and carried away the same, did, at said time and place, gently lay hands on the said plaintiff, and did then and there, being a police officer in said city as aforesaid, take the said plaintiff into his custody, and safely keep her, while complaint could be made against her before some one of the justices assigned to keep the peace in said city of Providence, or before some other lawful authority, to be examined by or before such justice or other lawful authority concerning the premises, and to be further dealt with according to law. And by means of the said several premises aforesaid, the said plaintiff was imprisoned and detained for the space of hours, the same being a reasonable time for that purpose, and being lawful and just for the cause aforesaid." Concluding with a verification.

To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

Metcalf, in support of the demurrer.

Cohell, in reply, cited 1 Hilliard on Torts, 219 and notes; *Rohan v. Sawin*, 5 Cush. 281; *Davis v. Russell*, 5 Bing. 354; *Samuel v. Payne et al.*, 1 Doug. 359.

DURFEE, J. 1. We do not think the defendant's plea in justification is bad for the first reason urged in support of the demurrer, for, in our opinion, a constable or police officer is not bound to procure a warrant before arresting a person whom he has probable cause to believe guilty of a felony, even though there may be no reason to fear the escape of such person in consequence of the delay in procuring the warrant. *Davis v. Russell*, 5 Bing. 354.

2. The rules of pleading require that a plea justifying an arrest on suspicion of felony, without a warrant, should set forth the grounds of the suspicion, so that the court may judge of them and determine whether they afford probable cause or not. *Mure v. Kaye*, 4 Taunt. 34; *Boynton v. Tidwell*, 19 Texas, 118. The plea in this case states, in effect, that the defendant was, at the time of the

plaintiff's arrest, a police officer of the city of Providence; that he made the arrest under orders from the acting city marshal, to whom complaint had been made "that there had been feloniously stolen, taken and carried away from a certain room, to which no one but the occupant and the plaintiff had access, a large sum of money, to wit, the sum of thirty-three dollars," and that the defendant had "good and probable cause of suspicion, and vehemently suspected the said plaintiff to have been guilty of, or concerned in, the stealing and carrying away of the said money." The plea does not state who was the complainant or what were his means or opportunities of information, or to whom the stolen money belonged, or why the plaintiff should have been suspected rather than the occupant of the room where the theft was committed, or in fact any of the more particular circumstances, if any such there were, tending to fasten suspicion upon the plaintiff. A plea which is so general and indefinite in its averments does not, we think, meet the requirements of the rule. The plaintiff's demurrer must, therefore, be sustained.

So ordered.

NOTE.—That an officer may arrest without warrant, any person whom he has reasonable ground to suspect, has committed a felony, whether any felony has, in fact, been committed or not, is well settled. *Samuel v. Payne*, 1 Doug. 359, and *Ledwith v. Catchpole*, Caldecott's Cases, 391, are leading cases. In the former, the officer made the arrest on the statement of a third party; in the latter, on his own suspicions. See *Cowles v. Dumbur*, 2 Carr. & Payne, 566. But the officer must act in good faith and from probable cause and not from malice. In *Beckwith v. Philby*, 6 Barn. & Cress, 635, it was distinctly held that an officer has a right to arrest on his own suspicion that a felony has been committed. See, further, *Holley v. Miz*, 3 Wend. 350; *Wakely v. Hart*, 6 Bin. 316; *Eanes v. State*, 6 Hump. 53; *Lawrence v. Hedger*, 3 Taunt. 14; *Nicholson v. Hardwick*, 5 C. & P. 495; *Hobbs v. Branscomb*, 3 Camp. 420; *Brockway v. Crawford*, 3 Jones (N. C.) 433; *Long v. State*, 12 Geo. 393; *Burns v. Erben*, 40 N. Y. 463. But to justify an officer in arresting without warrant on his own suspicion, the crime supposed to have been committed, must amount in law to a technical felony. *Ree v. Thompson*, 1 Moody, 86; and if the arrest is made on the charge of a third person, the charge must amount, in fact, to a charge of felony. *Ree v. Curran*, 1 Moody, 133; *Bowditch v. Balch*, 5 Exchequer, 578; *Ree v. Ford*, R. & Ry. C. C. 329.—REP.

Taft v. Hartford, Providence and Fishkill Railroad Company.

TAFT, Trustee, v. HARTFORD, PROVIDENCE AND FISHKILL RAILROAD COMPANY.

(S R. L. 319.)

Railroad company. Preferred stock — dividends on.

The holder of "preferred and guaranteed stock in the H., P. & F. R. R. Co. being entitled to preferred and guaranteed dividends, at the rate of ten per cent per annum, payable semi-annually, before any dividend shall be paid on other stock of said company," is entitled to this sum, payable only out of the earnings of the company which are legally applicable to the payment of dividends.

ACTION of assumpsit for the recovery of dividends. The case is stated sufficiently in the opinion.

Durfee & Eames, for the plaintiff.

Curry & Blake, for the defendant.

BADLEY, C. J. The defendant corporation was authorized, by an amendment of its charter, to issue 5,000 shares of additional stock, and to provide that the same be "a preferred and guaranteed stock, entitling the holder to preferred and guaranteed dividends equal to ten per cent per annum, payable semi-annually." Pursuant to this authority, this stock was issued, and the certificates, entitled "preferred and guaranteed ten per cent stock," contained the expression, "the same being entitled to preferred and guaranteed dividends at the rate of ten per cent per annum, payable semi-annually, before any dividends shall be paid on any other stock in said company." This suit is brought to compel the company to pay the plaintiff, holding a portion of its stock, a sum of money equal to ten per cent per annum on his stock, though no dividends have been earned.

The question presented is, what is the meaning and engagement of the company, as expressed in these words? The relations between these parties are obviously those between shareholders and the corporation. They are not, on the face of the contract, those of creditor and debtor. A corporation may issue bonds or other obligations convertible at certain times and upon certain contingencies into stock. They may issue stock, as in this case, redeem-

Taft v. Hartford, Providence and Fishkill Railroad Company.

able at a certain time and upon certain conditions. But until such change is made in either case, the original relation remains. A holder of the stock retains his right to share in the management of the corporation and to participate in its profits. He is not its creditor by virtue of this relation. If he is to be constituted its creditor, there are well-known modes and words by which that relation can be expressed. If, instead of adopting them, he receives a certificate of stock, and then claims to be both its creditor and stockholder by virtue of the same contract, the burden is upon him to show that such anomalous relation exists. The presumptions of law and the usual course of business are against him. In this case, the evidence of the relation is a certificate of stock, and the subject of the engagement or contract is the dividends, so called, to be paid upon it. A dividend is money paid out of profits by a corporation to its shareholders. A preferred dividend is that which is paid to one class of shareholders in priority to that to be paid to another class.

The word over which the controversy arises in this case is "guaranteed." Guaranteed, in addition to preferred, applied to dividends, means what? It is certainly not used in the strict and proper sense of the word, for there is, in this contract, no third party promising to make good an engagement by the corporation to its stockholders. Is it, on the one hand, an instance of that tautology so common in legal proceedings—a synonym for "preferred," and not increasing its significance? Or does it, on the other hand, when it is added to the word dividend, entirely change its character and meaning, and convert a dividend, which, in its nature, cannot legally exist except when originating in profits, into a liability entirely independent of the pre-existence of such profits? Or has it still a third signification, by which, added to the idea of a simple preference out of dividends, it shall be considered as an engagement that a dividend, equal to the sum of ten per cent per annum, shall be charged upon all the profits which, from year to year, may accrue, thus binding and pledging the total sum of all the earnings of the company, so long as the engagement lasts, to the payment of a dividend "equal to," as the amended charter says, "at the rate of," as the company express it, as much as ten per cent per annum, if semi-annually paid, would amount to, and this amount to be paid before the other stock receives anything?

Intervening the two arguments in this cause, the court examined,

Taft v. Hartford, Providence and Fishkill Railroad Company.

and desired the counsel to examine, beyond our own libraries, the decisions of the courts upon this subject, to see if this somewhat anomalous expression had received a judicial or practical construction. Among the emergencies so common to these railway companies in our country, and in that from which we derive our language and so much of our law, we thought it not unlikely that similar circumstances had induced similar contracts, and that the language used by this company, doubtless under the advice of counsel, might have been taken from railway legislation or contracts elsewhere, and with a full knowledge of its legal and practical meaning. In this country we found no decision throwing light on this question. In England, however, there are several. The most apt of these cases is, perhaps, *Henry v. The Great Northern Railway Co.*, 3 Jurist, part i, p. 1133. An act of parliament in that case authorized the company "to guarantee the payment of dividends," not exceeding a certain per cent, "and in preference to the payment thereof on other shares." The question in this, as in the other English cases over similar words, was between what we have indicated as the first and third construction. It has never been even claimed in the English courts that the construction secondly stated by us, and urged by the plaintiff, could be adopted, and the court decides that these statutes guarantee to the favored stockholders "a charge on all accruing profits, at the stipulated rates, before anything is divided among the ordinary shareholders. This is substantially *interest* chargeable exclusively on profits." And they further hold that if the profits accrued when the dividend is declared are insufficient to furnish the stipulated amount, *the deficiency is a charge upon subsequent profits*. Again, in *Crawford v. Northeastern Railway Company*, 3 Jur., N. S., part i, p. 1093, Vice-Chancellor Wood says, in conclusion: "Of course, I do not mean to say that it is a guaranty in any other sense than that you are to be paid these sums out of the profits of the company. That is the only fund you are to look to. If the company make no profits you will have no dividend, but, I apprehend, the profits in perpetuity."

In *Matthews v. Great Northern Railway Company*, 5 Jur., N. S., part i, p. 284, the vice-chancellor says of the term "guaranteed share": "It must be a guaranty limited, at least, to the whole profits made by the railway."

Without dwelling longer upon this and similar authorities, it is perfectly apparent that the guaranty of a dividend by a railway

Taylor v. Peckham.

company is considered by the courts, and, it seems from the course of the argument by the counsel in these causes, who, doubtless, faithfully represent the interests and wishes of their clients, by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed; and as the statement of facts admits that dividends have not been earned in this case, the plaintiff, if there were no other difficulties in his way, could not recover, and we must give judgment for the defendant.

TAYLOR V. PECKHAM, Treasurer of the City of Providence.

(8 R. I. 240.)

Highway — injury to traveler from falling sign.

For injury sustained by a traveler on a highway, from the falling upon him of some object from an adjacent building, as a sign insecurely fastened, a town is not liable under the statute requiring towns to keep highways in "good repair."

MOTION for a new trial, for reason of error in instructions to a jury.

The action was for injury suffered by the plaintiff from the falling upon him of a large show-board, placed near or upon the sidewalk of a much traveled highway in the city of Providence. It was contended for the plaintiff, upon the evidence offered, that the board had long been standing on the spot designated, and had often been noticed by passers-by as a dangerous object, but it was not pretended that any complaint, in regard to it, had ever been made to the surveyor of highways, or any other city officer. The immediate cause of the fall of the board was a remarkably heavy gust of wind, which, it was shown, disturbed and displaced various objects in the neighborhood as well as the show-board. The alleged errors in the charge to the jury are set forth, with sufficient fullness, in the opinion of the court. The jury having returned a verdict for the plaintiff, the defendant now moves for a new trial.

Cohoe and *B. N. Lapham*, for defendant.

Taylor v. Peckham.

I. The bill-board which injured the plaintiff, not being within the limits of South Water street, did not constitute a defect or want of repair for which the city would be liable, and the charge of the judge to the contrary was erroneous.

II. Towns are not liable for defects in highways, unless indictable. Rev. Stats., ch. 44, §§ 13, 14; Angell on Highways, 278; *Frost v. Portland*, 11 Me. 271; *Bigelow v. Weston*, 3 Pick. 267; *Snow v. Adams*, 1 Cush. 443; *Howard v. N. Bridgewater*, 16 Pick. 189. The bill-board was private property, on private property, and used for private purposes. No indictment would lie. If negligently put up, the person who put it up is responsible.

III. Towns are not required to keep whole limits of highways in repair for travel. *Hull v. Richmond*, 2 Woodbury & Minot, 343; *Howard v. North Attleborough*, 16 Pick. 189; *Keith v. Easton*, 2 Allen, 252 (also in 24 Law Rep. 353); *Smith v. Wendell*, 7 Cush. 498; *Vinal v. Dorchester*, 7 Gray, 421.

IV. A town is only required to make its highways safe and convenient for travelers in the proper attributes of a way. Rev. Stats., ch. 44, §§ 1, 13, 14. If there is no structure within or above the highway, there is no defect or want of repair. *Hixon v. Lowell*, 13 Gray, 59. Towns are not liable for defects and neglects outside of the limits of the highways. *Rowell v. City of Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, 7 id. 104. Though towns may be required to fence their highways against embankments, excavations, pits and water, they are not bound to fence against smooth, level land. *Sparhawk v. Salem*, 1 Allen, 30.

V. If the city could not remove the bill-board nor fence against it, it is not liable. *Jones v. Waltham*, 4 Cush. 299. Surveyors can only go upon adjoining lands for materials for repairs. Rev. Stats. 125. The city could not remove the board without committing a trespass, nor fence against it without becoming liable.

VI. The judge should at least have charged that if there was but one cause of injury, and that proceeded from the defendant's neglect, outside of the limits of the highway, the city would not be liable. *Rowell v. Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, 7 id. 104; *Shephard v. Chelsea*, 4 id. 113.

Neville, with whom was *Blake*, for plaintiff.

I. Towns are liable for injuries resulting from obstructions outside the line of the highway, but so near as to render traveling on

the highway dangerous. *Coggswell v. Lexington*, 4 Cush. 307; *Hogden v. Attleborough*, 7 Gray, 338; *Palmer et al. v. Andover*, 2 Cush. 600; *Currier v. Lowell*, 16 Pick. 170; *Rice v. Montpelier*, 19 Vt. 470; *Cassedy v. Storkbridge*, 21 id. 391; *Tully v. Portsmouth*, 35 N. H. 303; *Davis v. Hill*, 41 id. 329; *Savage v. Bangor*, 40 Me. 176; *Clapp v. City of Providence*, 17 How. 161; *Alger v. Lowell*, 3 Allen, 402; *Batty v. Duxbury*, 24 Vt. 155; *Cobb v. Standish*, 14 Me. 198.

II. Actual notice to the town of the existence of the obstruction is not necessary. *Drury v. Worcester*, 21 Pick. 44; *Bardell v. Jamaica*, 15 Vt. 438; *Mason v. Ellsworth*, 32 Me. 271; *How v. Plainfield*, 41 N. H. 135; *Hull v. Manchester*, 40 id. 410.

III. No matter by whom the obstruction may have been placed in position, the town is liable, provided, of course, the plaintiff himself be guilty of no negligence. *Snow v. Adams*, 1 Cush. 443, and cases cited above; *Bigelow v. Weston*, 3 Pick. 267; *Frost v. Portland*, 11 Me. 271; *French v. Brunswick*, 8 Shep. 29; *Davis v. Bangor*, 42 Me. 522.

IV. The question is not whether the obstruction is within the limits of the highway, but whether the usually traveled part of the highway is rendered unsafe and inconvenient for travel, etc.

BRADLEY, C. J. The plaintiff, passing along South Water street, in Providence, was injured by a show-board which, having been placed upon land adjacent to the highway, had been blown down by a high wind and fell upon him. He recovered a verdict for \$5,500 against the city, and a motion for a new trial is now made, founded upon alleged errors in the rulings of the judge trying the case; in substance, that he declined to instruct the jury that the city would not be liable for such accidents; first, because the show-board was placed by a third party outside of the street; and, second, because the injury was caused by the concurrent acts of such party and the city, if at all from the fault of the city.

It may not be easy to classify all the decisions upon the liability of towns for injuries received by travelers on the highway; but we are of opinion that those which are most analogous to the case at bar do not sustain the plaintiff. Those which he has cited, where the town was held liable when a traveler went off from the highway against a post, or into an adjacent cellar, or into a pond off a steep declivity, may, perhaps, be all sustained upon the prin-

Taylor v. Peckham.

ciple that it is the duty of the town to protect, by railings, the side of the highways, so that a traveler using proper care need not fall upon dangers immediately adjacent. The court in which most of these cases have been decided has since held that when snow falls from an adjoining roof upon and to the injury of a traveler on the high way, the town is not liable to pay for such injury. *Hixon v. City of Lowell*, 13 Gray, 59. The same court has also held that when a person slips and falls upon the steps of a building contiguous to the highway and upon the sidewalk, the sidewalk and the steps both being out of repair, still, as the accident happened from the concurrent fault of the town and a third party, the town is not liable. *Rowell v. City of Lowell*, 7 Gray, 100. We think these cases furnish the nearest analogies to the case at bar.

This liability is one created by statute, and cannot be enlarged by courts beyond the scope and intention of the statute; and when a town keeps a highway in order, the liability for accidents in consequence of a sign being insufficiently fastened against an adjacent building, was not intended by the statute, we think, to be imposed upon the town. It is one of the largest class of accidents to which a traveler upon a public thoroughfare is subjected, though the town may have done its whole duty, under the statute, in regard to the highway. The liability for such accidents would carry with it an equally extensive authority. The towns must necessarily have a corresponding right to control the uses of property adjoining the highway, so as to protect themselves from the liabilities for such use. Our statute permits the surveyor of highways to go outside of the highway for certain specified purposes; and those purposes do not include any protection of the traveler upon the highway from accidents like this, arising from the use of lands or buildings not within the highway. This right, if it exists, must have some other origin than a statute which imposes a liability for the care of highways; and even the right to protect the sides of the highway, by a rail or otherwise, from contiguous dangers, like an open cellar or a steep and dangerous declivity, does not include the right or the duty to fence off the side of the way, when no such immediate and adjacent danger exists. *Sparhawk v. Salem*, 1 Allen, 30.

Entertaining these views of the law upon this subject, a majority of the court think a new trial should be granted, as the instructions to the jury were not in conformity with them.

NOTE.—See to same effect, *Jones v. Boston*, 104 Mass. 75 (6 Am. Rep.)

National Exchange Bank v. Hartford, Providence and Fishkill Railroad Co.

NATIONAL EXCHANGE BANK V. HARTFORD, PROVIDENCE AND FISH-
KILL RAILROAD COMPANY.

(8 R. I. 373.)

Coupon bond. Coupons negotiable.

It is settled by the current of American authorities that a coupon bond is negotiable, and that its coupons may be detached and negotiated separately by simple delivery, and sued on separately from the bond, and this after the bond itself has been paid and satisfied, as well as before.

A coupon, once detached and negotiated, ceases to be a mere incident of the bond, and becomes an independent claim, and its amount, with interest after demand of payment, is recoverable under a general count in debt.

ACTION of debt for the recovery of the sum of \$420, and interest, being the aggregate amount of twelve coupons or interest warrants, of \$35 each, numbered from 1277 to 1288, inclusive, and originally attached to bonds of corresponding numbers of the defendant corporation, and being the half-yearly interest thereon, payable on the 1st day of July, 1858, at the office of the defendant corporation, in Hartford, on the delivery of the coupons.

The declaration contained a special count on each of the bonds and coupons, or interest warrants, and also a general count in debt for interest. In each of the special counts it was alleged, in substance, that the defendant corporation, on the 1st day of December, A. D. 1853, by its writing obligatory of that date, acknowledged itself to be indebted in the sum of \$1,000, for borrowed money, to Thomas P. Williams, W. H. Imlay and D. F. Robinson, trustees, to be paid to , or bearer, on the 1st day of January, A. D. 1864, with interest at the rate of seven per cent per annum, payable half-yearly, on the 1st day of January and the 1st day of July, in each year, at the office of the defendant corporation, in Hartford, on delivery of the warrant therefor annexed to said writing obligatory; that, at the date of said writing obligatory, there was annexed thereto an interest warrant for \$35, being the half-yearly interest on said writing obligatory, numbered , payable on the 1st day of July, A. D. 1858, at the office of the defendant corporation in said Hartford, on the delivery of said interest warrant; that on the 1st day of January, A. D. 1854, the Exchange Bank became and were the holders and bearers of said writing obligatory and of the

National Exchange Bank v. Hartford, Providence and Fishkill Railroad Co.

interest warrant thereto annexed, and whilst such holders and bearers, on the 1st day of July, 1858, detached the said interest warrant from the said writing obligatory, and, as the owners, holders and bearers of said interest warrant, held the same until the delivery thereof, under the provisions of chapter 535 of the public laws of the State, to the plaintiffs, who thereafter and at the date of the plaintiffs' writ were the owners, holders and bearers of said interest warrant; that, on the 1st day of July, 1864, the said Exchange Bank, upon payment of said sum of \$1,000, mentioned in said writing obligatory, delivered the same to one H. T. Sperry; and that, afterward, on the 16th day of September, 1864, the said Exchange Bank, being then the owners, holders and bearers of said interest warrant, presented the same to the treasurer of the defendant corporation, at its office in said Hartford, and demanded payment thereof, which was refused, whereby an action accrued to the plaintiffs to recover of the defendant corporation the several sums of money mentioned in the special counts in said declaration, being the sum of \$420, and interest thereon. In a general count it was alleged that the defendant corporation, at the date of the plaintiffs' writ, was indebted to them in one other sum of \$800 for interest.

The defendants demurred to the declaration, alleging, for special causes, that the plaintiffs are not owners of any of the bonds mentioned, but that the same had been paid by, and surrendered to the defendant corporation, prior to the commencement of this action.

Curry, for the defendants, cited *Crosby v. N. L. & N. R. R.*, 26 Conn. 121; *Rose v. Bridgeport*, 17 id. 243.

Eames, for the plaintiffs, cited *Ide v. The Passumpsic and Connecticut River Railroad Co.*, 32 Vt. 397; *Morris Canal and Banking Co. v. Fisher*, 1 Stockton (N. J. Ch.), 667, 698-700; *Chapin v. Vermont and Massachusetts Railroad Co.*, 8 Gray, 595; *Carr v. Le Fevre*, 27 Penn. 413, 418; *Mechanics Bank v. New York and New Haven Railroad Co.*, 3 Kernan (N. Y.), 599; *Hollingsworth v. City of Detroit*, 3 McLean, 472; *White v. The Vermont and Massachusetts Railroad Co.*, 21 How. 575, 577; Redf. on Railways, 596, § 239, and cases cited; 1 Pars. on Con. 290, 291, and cases cited; *Connecticut M. L. M. Co. v. C. C. and C. Railroad Co.*, 41 N. Y. 21, 922; *Ide v. Passumpsic and Connecticut River Railroad Co.*, 32 Vt. 297, 299; *Commissioners of Knox County v. Aspinwall et*

National Exchange Bank v. Hartford, Providence and Fishkill Railroad Co.

als., 21 How. 530, 546; see, also, 24 id. 271, and id. 546, and 1 Black. 386; *County of Beaver v. Armstrong*, 44 Penn. (8 Wright) 63, 64, 69, 70; *Craig v. The City of Vicksburg*, 1857, referred to in Redf. on Railways, 596, § 239; 1 Pars. on Con. 290, 291; *Gelpcke v. City of Dubuque*, 1 Wal. S. C. U. S. 175-206; *Meyer v. The City of Muscatine*, 1 id. 384; 1 id. 291; *Seybert v. The City of Vicksburg*, 1 id. 272; *Van Hostrup v. Madison City*, 1 id. 294; *Mercer County v. Hackett*, 1 id. 83; *Murray v. Lardner*, 3 id. 110; *Sheboygan County v. Parker*, 3 id. 93; *Thompson v. Lee County*, 3 id. 327.

DURFEE, J. We think it settled, by the current of American authority, that a coupon bond, like those set forth in the plaintiffs' declaration, is negotiable, and that its coupons are also negotiable, and may be detached and negotiated by simple delivery, and sued on separately from the bond. The supreme court of the United States, in *White v. The Vermont and Massachusetts Railroad Co.*, 21 How. 575, 577, held that such bonds were negotiable, basing their opinion on the intent to give them a negotiable character, as shown in the form in which they are issued and put in circulation, and on the usage and practice of business men dealing in them, as well as the decisions of the courts. In *County of Beaver v. Armstrong*, 44 Penn. 63, it was held that the coupons of a railroad bond may circulate with the bond, or separately, and may be sued on entirely independently of the bond to which they were originally annexed. The case of *Commissioners of Knox County v. Aspinwall et al.*, 21 How. 539, 546, is to the same effect. Mr. Justice NELSON, in delivering the opinion of the supreme court of the United States, in the latter case, says: "A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest; and at the same time to permit complete evidence of the payment of the interest to makers of the obligation." And see *Thompson v. Lee County*, 3 Wall. 327, and cases cited on the plaintiffs' brief.

In the case before us, it is argued that the action is on the bonds, and that it cannot be maintained because the bonds have been paid

National Exchange Bank v. Hartford, Providence and Fishkill Railroad Co.

and surrendered. And, indeed, to sue on bonds which had been paid and given up would not be consistent with legal principle. But in this case the action is not on the bonds, but on the coupons, as separated from the bonds. The plaintiffs do, in the special counts of their declaration, set forth the bonds by way of inducement, but they found their claim on the coupons, expressly averring that the coupons had been detached before the bonds were paid and surrendered, and that they were subsequently presented by them, as the owners and holders, as separate demands on the defendants, and payment refused. But even if the special counts were open to the objection made by the defendants, there is, in the declaration, a general count in debt, under which the plaintiffs can prove their claim, which is not open to the objection.

It is further contended for the defendants, that the coupons have no validity except as accessories of the bonds, and that the bonds having been extinguished by payment, the coupons are also extinct.

But if it appears on the record that the bonds have been paid and surrendered, it also appears that the coupons had been previously detached; and having thus, according to the cases we have cited, lost their character as mere incidents of the bonds, and become an independent claim, we are of the opinion that the payment of the bonds could have no effect on their validity. Indeed, to hold otherwise would thwart, if not defeat, the very purpose for which the coupons were made separable from the bonds.

The demurrer should be overruled, and the plaintiffs have judgment for the amount due on their coupons, with interest from the time of demand.

MARTIN v. CLARKE *et al.*

(8 R. I. 389.)

Evidences — parol. Champerty. Attorney and client.

The rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument, does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law.

Champerty is an offense against the law, whether regard be had to the ancient common law, the English statutes upon the subject, or to the legislative acts of Rhode Island, and therefore avoids every contract into which it enters.

A contract between an attorney and counselor-at-law and a client, that the attorney shall prosecute a claim at his own cost and charge, for a part of the subject in litigation, is champertous, illegal and void.

In equity. A bill to compel specific performance of a contract for conveyance of lands.

To the bill the defendant Clarke filed a several answer, upon which arose the points discussed and determined. By consent of parties, an interlocutory decree was entered, in substance, that the complainant have leave to withdraw his replication, and that the cause be heard upon the bill and answer; and that "in case the court shall decide that the matters of fact alleged in the answer were sufficient in law, the complainant have leave to file his replication *de novo*, and to have the truth of the matters alleged in said answers determined by a jury, upon proper issues framed by the court for that purpose."

The facts, other than as set forth in the court's opinion, were substantially these:

One Eliza Angell, a maiden lady, possessing a large landed property of great value, by her last will and testament devised the greater portion of it to trustees for certain specified objects, in her view eminently proper and praiseworthy, to the exclusion of her relatives and heirs-at-law. This instrument was approved and established by the court of probate of North Providence, from whose judgment an appeal was taken to the supreme court by one or more of the aggrieved heirs. This appeal was prosecuted, one Le Baron Martin (one of the heirs) always appearing and acting as the party litigant on behalf of the heirs in general; and after three trials before a jury, the testatrix was adjudged to have been of

Martin v. Clarke.

insane mind, and the will was set aside. Thereupon arose a controversy between the said Le Baron Martin and the other heirs-at-law of the said Eliza, of whom the defendant Clarke was one, to adjudge and settle which the aid of the court was invoked by this bill.

The bill alleged that between said Martin and said heirs there was, at a certain date, negotiations which resulted in contracts under seal, in the words and figures following, that with the defendant Clarke being the same as the contracts with the others:

“Agreement made the seventh day of October, 1861, by and between John H. Clarke, of the city and county of Providence and State of Rhode Island, and Le Baron Martin, of North Providence, in said county:

“Whereas, Elizabeth Angell, sometimes called Eliza Angell, late of said North Providence, has deceased, leaving a last will and testament, which was admitted to probate by the court of probate of said town of North Providence, and from which an appeal has been taken, and is now pending in the supreme court of said county of Providence; and whereas, the said Clarke and Martin are both heirs-at-law of said Eliza Angell, now therefore it is agreed by and between the said parties, their respective heirs, executors, administrators and assigns, that the said Martin shall carry on and prosecute the said suit and all proceedings which may be connected therewith, at his own proper costs and charges, and that, in consideration thereof, he, the said Clarke, his heirs and assigns, shall immediately, upon the setting aside of said will or other determination of said suit in favor of the heirs-at-law of Eliza Angell, convey and assure unto the said Martin, his heirs and assigns, one-half part of all his, the said Clarke's, right, title and interest in and to all the real and personal estate of the said Eliza Angell, at the time of her decease.

“Witness our hands and seals, the day aforesaid.”

In virtue of this agreement, the complainant claimed that he was entitled to a conveyance from the defendant Clarke, alleging performance of the contract on his part, and a refusal to perform on the defendant's.

The defendant, in his answer, admitted the execution of the contract, and avowed his willingness and readiness to perform it to the letter; but in excuse for not having already done this, proffered proofs of the following facts:

That, at the time of the signing of the contract (above quoted), and afterward during the pendency of the appeal, he was repeatedly informed and assured, by said Martin, that he (Martin) was the only person interested with the defendant in this contract, and that he (said Martin) was the principal therein; and that, in April, 1865,

Martin v. Clarke.

after the termination of the suit on appeal, one Rollin Mathewson, an attorney and counsellor of this court, who, from the commencement of the litigation, had acted as counsel for the heirs-at-law, requested him (this defendant) not to convey any portion of said estate to said Martin, because he, the said Mathewson, was in fact the principal in said contract, and had, at his own cost and charge, done and caused to be done all that, under said contract, said Martin was bound to do—the said Martin having been, throughout, simply his agent, for a stipulated rate of compensation—he, said Mathewson, exhibiting, in corroboration of his statements, an instrument in writing, signed by said Martin, in the words and figures following:

“Whereas, John H. Clarke and others, who are heirs-at-law of Eliza Angell, late of North Providence, deceased, have heretofore executed agreements to convey to me one undivided half part of all their right, title and interest, respectively, in and to all the estate, real and personal, whereof the said Eliza was seized or possessed or entitled to at her decease; now, this is to declare that said agreements are and were for the benefit of Brockholst Mathewson, and that my name is used therein as trustee for him, and not otherwise, provided that said Mathewson is to pay or secure to me, by good and sufficient sureties, if required, the sum of \$5,000 for my services and commissions in attending to said business, and this declaration embraces all the agreements heretofore made with me by any and all of said heirs.

“And I further declare that the conveyance of their interests, by said heirs, to me, under their said agreements, shall be for the benefit of the said Mathewson, and that I will stand seized and possessed of the same in trust for him, his heirs and assigns, subject only to the payment of the said sum of \$5,000 to me, my executors, administrators or assigns.

“It is further agreed that I shall have, in addition to the said sum of \$5,000, the whole of my share as heir-at-law to Eliza Angell, free and clear of all expenses of suit; and in case any of the parties shall refuse to convey their share according to said agreement, there shall be deducted from said sum of \$5,000 a just proportion of the loss suffered thereby.

“(Signed)

LE BARON MARTIN.”

And further, the defendant averred that, subsequently, he received written notices from the counselors and attorneys of said Mathewson, forbidding any transfers by him to any one other than said Mathewson, and claiming a transfer to said Mathewson; and, furthermore, said, in his answer, that he was informed and believed that the said Martin, in making and executing said contract and agreement with him, acted therein as the agent or trustee of the said Mathewson, or of some other party, and not as principal; that

Martin v. Clarke.

the said Mathewson is, and at the time of making said contract was, an attorney and counselor-at-law in the county of Providence, and, as such, an officer of this honorable court; that said Martin had no interest in said contract except as such agent or trustee; that the said Mathewson, or the other parties for whom said Martin contracted as aforesaid, were not, nor was either of them, an heir-at-law of the said Eliza Angell, and were not, nor was either of them, entitled to, or interested in, any of the said property of the said Eliza, save as under the said contract and agreement, and that said contract and agreement was unlawful and void.

J. M. Clarke, for defendant.

The contract in question was illegal and void. 4 Bl. Com. 134; 4 id. 135; 1 Rus. on Crimes, 175, 177, 179; 1 id. 181. Champerty is an offense at common law. 6 Dane's Abr. 741, § 41; *Thurston v. Percival*, 1 Pick. 415; *Weakly v. Hall*, 13 Ohio, 167; 4 Kent's Com. (ed. 1854) 492, note *a* (side p. 449). It is also punishable by statute, as a common-law offense. R. S. 550. An agreement to receive ten per cent upon the sum which should be recovered, is void. *Thurston v. Percival*, 1 Pick. 415. An agreement to pay an agent five per cent in case he recovers, and, if he does not recover, no more than his actual expenses, amounts to champerty, and is, so far, illegal and void. *Lathrop v. President, Directors and Company of Amherst Bank*, 9 Met. 489. The same rule applies to attorneys and clients. 6 Denio, 607; 10 Paige, 352; 3 Ves. 203; 1 Hoffman's Ch. R. 421; *Holloway v. Lowe*, 7 Porter (Ala.), 488. An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence to procure evidence to substantiate the claim upon condition of receiving a portion of the sum recovered, is illegal. *Stanley v. Jones*, 7 Bing. 369 (20 Eng. Com. Law R. 165); see, also, *Frye v. Potter* (decided in 1856), 38 Eng. Law and Eq. 67; *Thompson v. Ide*, 6 R. I. 217; *Sayles and others v. Tibbitts and others*, 5 id. 79. Said contract, moreover, was against public policy and against justice, and void.

B. N. Lapham, for complainant.

The contract must be shown to be illegal,—savoring of illegality

Martin v. Clarke.

is not sufficient. Fry on Specific Perf. of Confs. 155, 214, 215, §§ 204, 307, 309, 311-313; *Powell v. Knowles*, 2 Atk. 224; *McCallum v. Mortimer*, 9 M. & W. 636; *Tennant v. Elliott*, 1 B. & P. 3. The contract between Martin and Clarke was lawful. Both had an interest in the subject of the suit. 1 Mass. Dig. 206; *Call v. Calif.*, 12 Met. 362; *Findon v. Parker*, 11 M. & W. 675; *Goodspeed v. Fuller*, 46 Me. 141; 4 Vt. 446, and note. As Martin had a legal right to make the contract he had a legal right to sell it, either in whole or in part. Fry on Spec. Perf. of Confs. 104-106, §§ 123, 124.

The contract between Clarke and Martin was for the sale of an interest in real estate, and, by the statute of frauds, must be in writing. It cannot be varied by parol evidence. 1 Hilliard on Vendors, 172; *Bartlett v. Pickersgill*, 1 Cox, 15; *Ladd v. King*, 1 R. I. 224.

The English law against buying pretended titles (champerty) has not been adopted in this State. The English statutes are of Edward I, Edward III and Henry VIII; not by statute. *Potter v. Thornton*, 7 R. I. 252. No English statutes are in force here, save such as have been specifically adopted by the general assembly. 5 Col. Records, 289. Nor by the courts as common law. There is no decision where the law of champerty has been held to be in force. It ought not to be introduced now. The state of society does not require it. The tendency of legislation and of judicial decisions is against it. It was early introduced by statute into some of the States—Connecticut, New York, Virginia, North Carolina and a few others—and was also early introduced into Massachusetts, as common law. *Thurston v. Percival*, 1 Pick. 415; 5 id. 348; 9 Met. 489. In Massachusetts it is adhered to by the courts, but not with favor. 5 Pick. 348. In New York it has been modified by statute, and an intention expressed to abolish it. 4 Kent, 446; *Sedgwick v. Staunton*, 4 Kern. 289 (a case somewhat similar to this). Under the Code (§ 103), attorneys may contract for a part of the thing recovered. *Benedict v. Stewart*, 23 Barb. 420. In the following States it has not been adopted, either by statute or by the courts of common law: New Hampshire, 5 N. H. 181; Delaware, 3 Harrington, 139; Pennsylvania, 6 Binney, 420, 421; Georgia, 23 Ga. 83; Iowa, 3 Iowa, 482-485. Nor has it been adopted in Ohio, Illinois, Mississippi, Missouri or Louisiana. In *Roberts v. Cooper*, 20 How. 483, it is said the law of champerty and maintenance is not favored in this country. And even in Eng-

Martin v. Clarke.

land, rights of entry are salable by deed. Vic 8 and 9, ch. 106, referred to in 4 Kent, 447, note. The statute law of Rhode Island is averse to it. By a supplemental statute, any right of entry into real estate may be sold, without regard to the possession. P. Laws, ch. 359, p. 110. In the revisions of 1844 and 1857, the statutes against champerty, contained in the revisions of 1798 and 1822 and the Code of Laws of 1847, are omitted. Champerty having been a statutory offense in England from the year 1275 to the time the first Code of Laws was made in Rhode Island, in 1647, and being made a statute offense by that Code, cannot now be considered a common-law offense. 3 Edw. I, ch. 25 (1225); 33 Edw. I, stat. 2, 3; Keble's Dig. 69 (1304, 1305); 32 Hen. VIII, ch. 9, 507 (1541); R. I. Code of Laws of 1647, 18, 41. Nor can it be said to be a common-law offense because there is a provision in the Revised Statutes (p. 550) providing for the punishment of common-law offenses, for the same provisions were contained in the revision of 1798 (p. 604), and in the revision of 1822 (p. 553), which provided a specific punishment for champerty. It never was a common-law offense. In Fitz Herbert's *Natura Brevium*, published in the reign of Henry VIII, in 1514, is a suit of champerty based entirely upon the statute of Edward I. This shows it not to have been a common-law offense.

BRAYTON, J. The bill in this case prays for the specific performance of a contract for the conveyance of certain real estate, made by the defendant with the plaintiff. The parties to the contract were both heirs-at-law of one Eliza Angell, whose last will and testament had been admitted to probate, and an appeal taken from the probate thereof, was, at the time of making the contract, pending in this court and undetermined. It was, thereupon, agreed that the plaintiff, Martin, should carry on and prosecute the appeal, and all proceedings which should be connected therewith, at his own proper cost and charges, and that the defendants, Clarke and others, in consideration thereof, should, upon the setting aside of said will, or other determination of the suit in favor of the heirs-at-law, convey and assure to the plaintiff one-half part of all his, the defendant's, right, title and interest in the estate of the said Eliza Angell at the time of her decease. The answer discloses that the plaintiff was, in making this contract, acting as the agent of one Rollin Mathewson, an attorney of this court, and that said Mathewson was not one of the heirs of the said Eliza Angell, nor,

at the time of making the contract, was he, in any wise, interested in the subject-matter of said appeal; and the answer claims that the said contract sought to be enforced was therefore champertous, illegal and void.

The question raised in the argument, upon the bill and answer, is, whether a sufficient defense is disclosed. The complainant insists that there is not; that the agreement was one required by the statute of frauds to be in writing, and, as written, it is a contract with the said Martin as principal, and inasmuch as both the parties had an interest in the matter in suit, the agreement is not open to any such objection as that it is champertous or illegal.

It is further agreed that, as it is not pretended by the respondent, that the contract has been altered or varied by any other writing between the parties, it is not competent for him to prove that it was other or different from that which the writing shows, and that the rule which excludes parol evidence to contradict, add to, or vary that which is contained in a written instrument, will not permit the defendant to prove, by parol, that Martin was agent merely and not the principal, as the written contract purports. The rule referred to will exclude parol proof of that which is here set up in the answer. It does not extend to evidence offered to show that the contract was made for the furtherance of objects forbidden by law, either by statute, by the common law, or by the general policy of the law. 1 Greenl. Ev., § 248.

The making of the agreement is here admitted, and the parties to it and its terms are as the writing shows; but, nevertheless, it is said—and it is proposed to be proved—that it was made with the intent, on the part of the contracting party, to accomplish an illegal purpose, and as part of a scheme for that end, viz., to call in the aid of a party not before interested in the matter in suit, to carry on the suit at his own costs and charges, for part of the subject in litigation. The rule excluding parol evidence will not prevent a court, either of law or of equity, from looking through all disguises in order to detect fraud or illegality, and from inquiring into the true nature of the transaction and the intent of the parties in this regard. The case of *Collins v. Bayntum*, cited by Greenleaf to this point, was a case at law, and the objection there was to a plea alleging that the bond sued was money advanced to compound the crime of perjury, and as the bond was for the payment of money only, which was legal, it was not competent to

Martin v. Clarke.

allege, to prove the unlawful consideration, the unlawful purpose of its payment. The answer of the court, by WILMOT, C. J., to this point, is by way of interrogatory: "What strange absurdity," said he, "would it be for the law to say that the contract is wicked and void, and in the same breath to say you shall not be permitted to plead that which shows it to be so? It is a transaction to gild over and conceal the truth, and whenever courts of law see such attempt, they will brush away the disguise and show the true nature of the transaction."

Another case is that of *Paxton v. Popham*, 9 East. 416, where the plea stated facts inconsistent with and contradictory to the condition of the bond; it was held that unless this were permitted, bonds would be made to cover any species of illegality and wickedness. The same principle which allows the illegality to be alleged, allows the allegation to be proved, if need be, by parol evidence.

For anything that appears to us, it is competent for the respondent to prove, what is alleged in this answer, that the contract was made in fact in the name of Martin, but for the benefit of Mathewson, and with the intent the estate agreed to be conveyed should vest in Mathewson, who had no interest in the suit aside from the contract, and to be a consideration to him for carrying on, at his own sole cost and charges, the suit then pending to its final termination.

It is quite clear that if they succeed in proving this, they will have proved a transaction champertous in its nature, and, if the law of champerty be in force here, illegal and void.

It is said, however, and insisted, that no principle of public policy is violated by enforcing this contract, and that there is no law against champerty in force in this State. It is urged, in support of this position, that there is no adjudication here that any such law exists that champerty is unlawful.

The reply of Lord KENYON, to a like suggestion in a case before him, might account for the absence of any solemn determination in this case, as well as in the one before him, viz., "that the *nisi prius* determinations were thought too clear to be questioned." There are, however, in our own reports two cases in which the inquiry was, whether the contract in question was champertous, and for that reason void. The fact that such question was raised and discussed, implies that it was deemed by the counsel and court a material one, which could not be if being champertous it were not

illegal. Neither case, however, holds expressly that champerty would avoid the contract. The fact of champerty was not found.

It is argued, further, that it could be an offense here only by force of sec. 1 of chap. 219 of the Revised Statutes, which provides that "every act and omission which is an offense at common law, and for which no punishment is prescribed by this title, may be prosecuted and punished as an offense at common law," and that champerty never was an offense at common law, and so is not within that section. The argument assumes that it is necessary to maintain that this was an offense by the ancient common law of England. If it were necessary to establish this, that champerty was held to be illegal and punishable by the ancient common law, the standard authorities would seem to render it entirely clear that it was so from the earliest times. Lord COKE, commenting upon the statute of Westminster I. ch. 25, the earliest English statute upon the subject, says it was against those maxims of the common law, viz., "*culpa est se inmiscere rei se non pertionenti*," and this other, "*pendente lite nihil innovetur*." He cites Bracton, who wrote before the statute, to show that it was one of the articles inquirable by the justices in Eyre, before the reign of Edward I, whether suits had been stirred up by certain officers by which justice and truth might be suppressed or delayed. He also cites Fleta, for the same purpose, that suits had been thus prosecuted, and he reasons thus, that it appears that the end of maintenance is to suppress truth and justice, or at least to work delay, and is therefore *malum in se*, and against the common law, and if maintenance *in genere* be so, much more is that worst species of it called champerty. This view is supported by every law writer since the days of Lord COKE and the reign of James I. Blackstone (vol. 4, p. 135) characterizes the offense as one against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. This is repeated by Judge STORY (Equity Juris. § 1048), who says it is an offense as well by the common law as by statute. Lord ELDON says it is against the general principle of policy. In *Wilber v. Duke of Portland*, 3 Ves. 494, Lord ROSLYN said it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se*, and that all the law books state it to be not upon the statute. TINDAL, C. J., in a late case of *Stanley v. Jones*, 7 Bing. 369, considered the principle upon

Martin v. Clarke.

which it rests as not confined to the common law of England, but that champerty was considered, in the earliest times and in all countries, as an offense of great mischief to the public. Chancellor KENT, in his Commentaries, holds, also—using his own language—that “the statutes of champerty are founded on a principle common to the law of all well governed countries, that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.” Then it is suggested by Lord COKE that there was reason for passing the statute against this common-law offense, “that the statute gives a greater punishment than was by the common law; that the first statutes were directed against the king’s ministers in his court, because they were in place to do more mischief by subverting justice and truth than others.” In the statute, 28 Edw. I, ch. 11, it is provided that that statute shall not restrain one from having advice and direction in law from those learned in the law, “*conseile des countours et des sages gents*,” yet, if a serjeant-at-law, apprentice or attorney take a feoffment, having the plea to maintain, though it be *pro suo dando*, in lieu of his fees, yet it is champerty, for this is to become party, and is in no sort allowed.” And it is not allowed for the reason given in the statute of Westminster, I. It was the worst species of maintenance. It was against those who, by their place, might do most mischief in perverting the law to an engine of oppression, and suppressing justice and truth.

And that the place of an attorney is regarded in this light, may be seen from the case of *Welles v. Middletown*, 1 Cox, 125, where it was held, as well settled, that an attorney cannot take a gift while the client is in his hands, not even instead of his bill; and the chancellor said there would be no bounds to the crushing influence of the power of an attorney, who has the affairs of the client in his hands, if it were not so; and, upon general principles of policy, a just gift will be set aside.

These statutes against champerty did not repeal the common-law prohibition, because a statute merely in affirmance of the common law does not repeal it. It is only where a statute enacts what is inconsistent with the rule of law before existing that it operates to repeal, whether the prior rule were one of the common law or prescribed by statute. For the same reason, the Code of Laws made in 1647, under the patent of 1643, 1644, containing a prohibition of this offense, did not alter the common law here, more than the

statutes of Edward I. did in England. So the common law on this subject never was repealed

A colonial statute, passed soon after the charter of 1663, provided that any person convicted of champerty should be punished by one year's imprisonment, and make fine to the colony as the judges should award. This act does not define the offense; it prescribes the punishment only, and we are left to inquire if that common law which the colonists brought with them for the definition of the offense which this act implies was existing. This act continued in force, down to 1844, substantially as it was originally enacted.

In 1749, 1750, another act was passed by the colonial legislature, in order to avoid some question which had arisen, which declared that (among other statutes of England) all statutes that are against criminal offenders, so far as they are descriptive of the crime, and where the law of the colony hath not described and enjoined the punishment, then that part of the statute that relates to the punishment also "shall be in force until the general assembly order otherwise." So this legislation continued down to the revision of the law in 1844; the act prescribing the punishment of champerty, as well as the act declaring the English statute descriptive of that offense, continuing in force here.

In the revision of 1844, the act prescribing the punishment was repealed, and, in the sixth section of the act establishing that digest, it was provided that "when no provision is made either at common law or by the statutes aforesaid (the Revised Statutes), such statutes as were introduced before the Declaration of Independence, and as have been continued in force, shall be considered as part of the common law, and remain in force until the general assembly provide therefor." So the offense is recognized by these acts as still existing.

Suppose, however, that champerty were not an offense at the common law, and were first made illegal by the statute of Westminster I. the answer to the question, if it be now an offense here, must still be the same. If there had been no legislation here upon the subject, the colonists here, upon their emigration, brought with them, to this country, the law of England as it then existed, as modified by statutes, so far as it was applicable to their condition and circumstances here, and this statute, as part of that law, became a part of the common law of this country.

Whether we look, therefore, at the ancient common law, to the

Hoppin v. Jencke.

English statutes upon the subject, or to our own legislation, the conclusion must be the same, that champerty is an offense against the law. Being such, it must avoid every contract into which it enters.

HOPPIN *et uxor* v. JENCKES.

(S R. L. 452.)

Arrest — privilege of member of congress from.

The privilege from arrest of a member of congress, under the provisions of the constitution, does not extend to forty days or more before and after a session, but is limited to a reasonable time for going and returning.

ASSUMPSIT upon the indorsement of certain promissory notes. The writ was served by the attachment of real estate. Plea of privilege of member of congress, under article 1., section 6 of the constitution of the United States. Demurrer to the plea.

L. C. Ashley and *A. Payne*, for the plaintiff.

The defendant's plea in abatement sets up two alleged points or grounds of defense against the service of the plaintiff's writ, viz.:

That defendant was a member of congress, and had not forty days or a reasonable time more than that in which to return home after congress adjourned on the 20th day of July, 1867, to meet on the day of November, 1867.

And the defendant was member of a committee of the house of representatives, authorized to sit in the vacation, and was, when said writ was served by attachment of property, engaged in duties put upon him by said committee, and which he avers entitles him to the same privilege as if said congress were on that day in session.

1. A member of congress is not entitled to the exemption set up in the plea. Nor is he exempt from the writ of arrest, or from arrest thereon for forty days after adjournment, but only from such arrest for a convenient time to return home, and until he returns home. 1 Story on Con., § 862, etc.; Jeffers. Man., § 3; *Convin v. Morgan*, 1 Johns. Cases, 416; *Lewis v. Elmendorf*, 2 id. 222;

Hoppin v. Jenckes.

Chaffee v. Jones, 19 Pick. 267; *Coffin v. Coffin*, 4 Mass. 29 and 34; 2 Strange, 987; 1 Blacks. Com. 165, 166 and note, Sharswood's ed.

2. The defendant's plea does not allege that the defendant *had not* returned home, and is therefore bad. *Colvin v. Morgan*, 1 Johns. Cases, 416, above cited.

3. This plea of privilege is not to be favored, and a plea is always to be taken most strongly against party pleading. 1 Chitty on Pl. 237.

4. That the defendant was performing duties under the direction of a committee of congress is no ground of exemption from arrest.

B. F. Thurston & L. Scott, and Jenckes, pro se.

I. The service of a writ of arrest upon a member of congress, during the period of his exemption from arrest, is equally null and void, whether said writ be served by arrest of the person or by the attachment of his property. *Knight & Co. v. Richmond & Carr*, 2 R. I. 75; *Waterman v. Isaac Merritt & Co.* 2 R. I. 345; *Seaver v. Robinson*, 3 Duer, 622; *Sanford v. Chase*, 3 Cow. 381; *Norris v. Beach*, 2 Johns. 294; *Colton v. Martin*, 1 Dall. 298; *Smythe v. Banks*, 4 id. 329; *Miles v. McCulloch*, 1 Bin. 77; *Halsey v. Stewart*, 1 South. 366; Cushing on Legislative Assemblies, §§ 503 and 541 to 548 inclusive; Const. of R. I., art. iv., § 5

2. No process of arrest can be issued against a member during the period for which his privilege lasts. Constitution United States, art. 1, § 6.

3. First, that period is during a session, and for a convenient time before and after the session. May on Law of Parliament, 120; *Gowdey v. Duncombe*, 1 Welsby, H. & G. 430; Rep. of the Jud. Com. of the House of Rep. on Culver's case to the Thirty-ninth Con.; Cush. on Leg. Assem., § 582. Second, the language of the constitution was taken from the rule of the British house of commons, *eundo, morando et redeundo*. May, 120.

4. The language should have the same construction here as in England.

5. In England the convenient time has been construed to be forty days at least. May, 120; *Gowdey v. Duncombe*, 1 Welsby, H. & G. 430.

6. The reason for such construction is greater in this country than in England.

Hoppin v. Jenckes.

7. But if not absolute for forty days, other circumstances may be alleged to show that the time is no more than reasonably convenient.

Allegations here are, first, that the defendant was charged with public employment growing out of his membership; second, and, also, that in matter of law the adjournment was a recess.

8. Defendant's plea is not bad for duplicity. Defendant is not precluded from introducing several matters into his plea; they are constituent parts of the same entire defense, and form one connected proposition, or if they are alleged as inducement to or as a consequence of another fact. Sand. on Plead. and Ev., vol. 2, part 1, side page 653; *Batts v. Purvis*, 2 Bla. 1022, 1028; *Robinson v. Bayley*, 1 Burr, 316, 318; *Carr v. Hinchliffe*, 4 B. & C. 547; *O'Brien v. Saxon*, 2 B. & C. 908; Com. Dig. Pleader, E. 2; 1 Ch. Pl. 558.

BRADLEY, C. J. This is an action against the defendant as indorser of certain promissory notes, in which he files a plea in abatement, setting forth, in substance, that at the time of the service of the writ, to wit, on the 23d day of August, 1867, he was a member of the house of representatives of the United States; that congress adjourned on the 20th day of July, 1867, to the 21st day of November, 1867; that he was a member of a joint committee of congress authorized to sit during the adjournment, and actually engaged at the time of the service of the writ in duties assigned him by that committee.

After these allegations the plea avers, "And said writ was pretended to be served on said 23d day of August, 1867, and by said pretended attachment upon a writ of arrest, and not otherwise, and not at any other time, or in any other manner, and said 23d day of August was within the period of forty days, or such other convenient period of time more than forty days, within which said defendant was entitled to the privilege secured to members of congress by the constitution of the United States of America, by which they are protected from writs of arrest in going to and returning from the sessions of congress, and while in attendance thereon."

The plea does not aver that the service was within a reasonably convenient time for returning, nor that it was during the actual or constructive session of congress. It raises the question of law, whether the defendant is entitled to such period of forty days, or more. When it further avers that he is entitled to protection also

as a member of the committee, it might be considered as raising a double defense upon the same plea, which, of course, is not permissible. Considering the plea, however, as raising the question of law which has been argued before us, as to the right of exemption from arrest of members of congress, for the same period before and after a session which is claimed to be covered by the privilege of members of parliament, we will proceed to consider and decide that question.

A preliminary question, however, arises in the case, whether the constitutional provision which exempts the person, also exempts the property of members of congress from process. The defendant has submitted some authorities in favor of the affirmative of that proposition. The plaintiff's brief does not controvert it. It is not necessary, therefore, for us very fully to consider it. We may observe, however, in view of this privilege, as it existed in the practice of parliament, and in the law of England prior to the adoption of our constitution, that there is much to favor the negative of the proposition. The house of commons ordered on the 14th of April, 1649, that in case of any proceedings at law against any member, he shall receive notice in writing of the pendency of the suit, whereupon, to quote the language of the order, "the member is enjoined to give appearance and proceed as other defendants in case of like suits or actions ought to do, or, in default thereof, both their estates and persons shall be liable to any proceedings in law or equity as other members of the commonwealth." House Journal of that date. The statutes 13th and 14th William III, ch. 3, and still more, the statutes of 10th George III, ch. 50, give full authority; the first with a limitation of fourteen days after a dissolution or prorogation, and to certain courts; the latter, without any such limitation of time or tribunal to the prosecution of suits against members of parliament, protecting only the person from arrest or imprisonment from any such suit or imprisonment. See May, 125-126. Without deciding that the privilege contained in the constitution itself would give any protection to the property of members of congress, we may rely, for the purposes of this case, upon the law of our State, which seems to be that when a writ of arrest cannot be issued against the person because of any privilege, his property cannot be attached upon original writ because of such privilege. The case of *Richmond & Carr v. Knight*, 2 R. I. 75, so decided; and this court, as at present constituted, has deemed it

Hopkin v. Jenckes.

proper to accept the former decisions of the court, without considering the grounds of them, especially where those decisions were but the construction of the statutes of the State. With the frequent sessions of the general assembly of so small a State, it is safe to presume that any mistake of the court would be corrected by subsequent legislation, and it is much better for the community that any changes of the law should be by statutes operating prospectively, rather than by decisions of the court operating retrospectively; and though this decision did not receive the concurrence of all the members of the court, we accept it as the law in this case. That decision, exempting from attachment the property of a voter during the time of his statute exemption from arrest, is closely analogous to the exemption claimed in the present instance, both being intended to protect a citizen while in the discharge of public trusts.

We come, then, to the inquiry, what is the extent of time covered by the privilege of exemption from arrest secured to members of congress by the constitution? The provision of the constitution is in these terms, article one, section six: "The senators and representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same." It is claimed that this privilege is an adoption into our constitution of the corresponding privilege of members of parliament. It is said to be the settled law of parliament to allow forty days before and after such sessions of parliament, in addition to the whole period of the session, as the time during which every member is exempt from personal arrest. The plaintiff's brief has referred us to 1 Blackstone, 165, in which this right of forty days' exemption is stated to be, by the law of England, one of the privileges of a member of the house of commons. Defendant's brief has referred us to May's Treatise upon Parliamentary Law, page 118, which states that such is the general opinion, and also to the case of *Gowdey v. Duncombe*, 1 Welsby, H. & G. 430, in which it is not only decided that such is the law of England, but it is said that "it has for about two centuries, at least, been considered the law of England." Brief refers us to the 2d of Strange, 985. The only case to which we have been referred in this country is a short *per curiam* opinion in the 2d of Johnson's Cases, 222, in which it does not appear how long after the session of congress was the interval before the member's

arrest, nor is any reference made by either court or counsel to anything but a single decision in the preceding volume upon a provision of the constitution of New York. The report of the judiciary committee of the house of representatives, in Culver's case, is claimed to have a conclusive force upon this question. It does not appear to have ever been formally adjudicated in our courts, and, as a question touching a provision of the constitution of the United States, it deserves the most careful consideration. We are to determine the meaning of words used in the constitution, not merely as they might be commonly accepted, but to inquire for their fixed legal signification at the time they were adopted as a part of that constitution. The words by themselves certainly do not import nor in any way suggest that the member was to be allowed a period of forty days or more in going to or returning from a session of congress. Before we can sustain the plea, we must be satisfied that the law of England, at the time of the adoption of the constitution, gave this right to members of parliament, and not only that this forty days was secured to them, but that it was secured as the convenient time for going to and returning from parliament; and we must also be satisfied that such construction of the terms of the privilege was understood as the true construction, and as such adopted in the phrase which defines this privilege in our constitution. We will therefore endeavor to ascertain what was the law of England upon this subject, as evinced either in the proceedings of parliament or of the courts, or in the compilations to which those who sought to know the law would have had recourse at and prior to the adoption of our constitution. What the progress of opinion in regard to this privilege may afterward have been in England, is of itself, of course, of no moment, though it may throw some light upon the inquiry in regard to what the law may have been at preceding periods in England. On the other hand, any opinions expressed in this country, especially near the time of the adoption of the constitution, by judges and jurists, or by our statesmen, or any inferences that may properly be drawn, either from what they have said or what they have omitted to say, should be carefully considered, and would materially assist in determining the result of our inquiries.

To begin, then, at the earliest time when we can obtain any light upon this subject.

The earliest case to be found in the proceedings of parliament

Hoppin v. Jenckes

touching the duration of time, after the session of parliament, for which the privilege of exemption from arrest was allowed, is *Martin's case*, in 1586, in the reign of Elizabeth. The report is found in Dewes' Journal, under the dates in which it occurred, the decision of the house being on page 414. It is quoted quite fully in Hatsell's Precedents, page 99, as follows: "On the 27th of February, 1856, the house was informed that, one William White had arrested Mr. Martin, a member of the house, therefore it was ordered that the sergeant should warn White to be here at to-morrow's sitting of the court." On the 16th of March, William White was brought into the house to answer his contempt for arresting Mr. Martin, who answered "that he caused him to be arrested the 22d day of January, which was above fourteen days before the beginning of the parliament." The house, upon this, appoints a committee to search precedents, who, on the 11th of March, make report of the privilege of Mr. Martin, arrested upon mesne process, by White, above twenty days before the beginning of this parliament holden by prorogation (mistaken for adjournment), and in respect that the house was divided in opinion, Mr. Speaker, with the consent of the house, moved these questions to the house:

1. Whether they would limit a time certain or a reasonable time to any member of the house for his privilege? The house answered, a convenient time.

2. Whether Mr. Martin was arrested within this reasonable time? The house answered, yes.

3. If White should be punished for arresting Martin? The house answered, no, because the arrest was twenty days before the beginning of parliament, and unknown to him that it would be taken for reasonable time. The report then goes on to give further reasons for the action of the house, among others, that this was the second time that White had arrested Martin. The house journal, under date of the 24th of April, 1840, gives an order of the house in regard to the arrest of a certain member in the following terms: "The contempt of his arrest to be declined, because it was not committed within the time of privilege, viz.: within sixteen days before the beginning of parliament and so many after." It also reports under the same date as follows: "It was said this day in the house, and not contradicted, that every member of the house hath privilege for sixteen days exclusive and fifteen inclusive at the beginning and ending of every parliament." Ferrell's Law of Parliament,

published in 1837, page 277, says, in regard to the last citation, "the like mention is made in several parliaments by members in debate." This last writer upon the topic "for how long a time before and after the parliament" this privilege exists, gives this last quotation from the debate in parliament, and its statement as to other debates with a brief recital of *Martin's Case*, as all that can be found upon this subject. Scobel's Journal, which we have not been able to find in any library to which we have had access, is quoted as citing on page 108 a similar order or the same order we have found in the house Journal. We do not find in any treatise, opinion or discussion upon this subject any other citation of any order or action of the house of commons touching this question of the duration of privilege. Indeed, much that has been decided and written upon this subject has been without any knowledge apparently of the orders, debates and actions to which we have referred. As we find no other citations to any action or order of parliament in any work to which we have had access, in either the excellent library of Brown University, the library of congress, the Astor Library, or the library of Boston, we feel warranted in assuming, what of course cannot be positively affirmed without a careful examination of every volume of the journal of the house of commons, that they do not, by any action or order of that body, claim this privilege of forty days or more, before and after each session, as being the time allowed them for going to and returning from parliament. We certainly can affirm that in a case which has been repeatedly quoted since, the house of commons, after searching for precedents, declared that they claimed, as distinct from any fixed time, only a convenient time, and subsequently announced, as the order of the house upon the subject, a period of sixteen days as the time of such privilege, and it is said that such claim has been frequently mentioned in debate without any contradiction.

We will now proceed to inquire what the courts have said and decided upon this question of the time of privilege. The first case is that of *Barnes v. Seigneur Ward, Siderfin*, 29. It is the case of a peer of parliament and decided in the 12th of Charles II, 1660, in which it is decided that he is entitled to twenty days. "*Et fuit dit que le privilege d'un member de parliament desire vient lorsque 20 jours devant, et apres le parliament come appient per le parliament ro. Come le chief justice dit comment que ils claime havet ceo, put 40 jours devant it appres que ils ne devoient avoir.*"

Hoppin v. Jenckes.

2. The case of *The Earl of Athol v. The Earl of Derby*, in the 24th of Charles II, 1672, reported in the 2d of Levinz, 721; also, in 2 Chancery Reports, 221. This also was the case of a peer, and it cites two orders of the house of lords in 1624 and 1628, claiming twenty days before and after each session, which the order says is time enough for them to come from all parts of the realm and return. Hereupon the lord chancellor ordered the sequestration to be delivered and executed immediately after the twenty days; but it is said the commons never assented to this, but claimed forty days after and before each session. The report in 2 Chancery is more full, and is as follows: "Whereupon a question arose, what time or privilege a peer hath, viz., whether twenty or ten days before and after session of parliament. The lord keeper sent to Lord Hollis and others to advise in it, and they produced the orders in the house of lords, whereby it appeared they declared their privilege to commence from the teste to the writ of summons for their first coming to parliament; and that upon every session and prorogation their privilege is for twenty days after such session. And it is said in the orders that it is sufficient time for them to come from all parts of the kingdom and to return, and they are in these orders desired to take notice of it and of the reason of it. These orders are, the one of the 21st day of May, 1624, the other of the 27th of January, 1628, entered in the journal of the book of the lords' house. But it is said the commons never agreed thereto, and think themselves not bound by it, and sequestration was executed accordingly."

The third case is that to which counsel have referred, 2 Strange, 985, decided in 1734. The case seems to have attracted so much interest as to have been reported in no less than seven different reports—in Strange, 985; Hardwick, 29; 7 Modern, 225; Fortescue, 159; 2 Barnardiston, 424, 433, 448; in Cunningham, 16, and Comyn, 444. Colonel Pitt was arrested two days after the dissolution of parliament. Strange says: "The chief justice declared that all the judges were of opinion Mr. Pitt was entitled to privilege *rele-undo* for a convenient time, and that within that time he was arrested." Hardwick's Reports: "That it was not necessary in this case to determine to what time it was limited for supposing it to be only for a convenient time." And in Modern Reports it is said the judges declined to fix the time. The other reports are substantially the same, Barnardiston and Cunningham being the

fullest. Comyn states the question and answer in this way: Second question—How long the privilege continued? It was said the lords have determined their privilege to have continuance for twenty days before the beginning, and twenty days after the ending of the session. But the commons claim forty days. 2 Levinz. "But the judges seemed to think that the commons ought to have a reasonable time before and after the session, but what time was reasonable never had been by them expressly determined. Yet this arrest seemed too hasty within the time that ought to be allowed for his return."

The next case is that of *Barnard v. Colonel Mordant*, 1 Kenyon, 125, decided in 1754. "The defendant, having been a member of the last parliament, was arrested ten days after its dissolution," canvassing a re-election in the borough he represented. The foundation on which he contended for the continuance of the privilege was, that it subsisted such a reasonable time after the dissolution of a parliament as might be supposed sufficient for the members to settle their affairs in town and return to their country seats. The defendant's seat was in Wiltshire, where, in fact he had not been at the time of his arrest. And a case of the like nature was mentioned—Comyn, 444—where John Pitt, Esq., whose seat was for Camelford, being arrested two days after the dissolution of a former parliament, the bail bond was ordered to be given up on a supposition of the continuance of his privilege. The court, in the present case, leaned against the rule; but as it was not opposed, they made it absolute for discharging the bail bond on entry of a common appearance.

These are all the cases to be found in the reports prior to the adoption of the Constitution. By them it appears that when this claim of forty days was first mentioned in court, it was mentioned by the chief justice as a claim that ought not to be allowed. A few years after, one reporter of a case (Levinz) observed that the commons made such a claim. The other and fuller report says, merely: "The commons do not consider themselves bound by the orders of the house of lords, which fixed twenty days for the privilege." And when we come to the case of Holliday and Pitt, so much considered by Lord HARDWICK and the ten judges, chiefly, however, upon other points than this, we find the courts, though they do not refer to this action of the house, which we have before quoted, seem to understand that there was no settled period,

much less a period of forty days, and they considered that the commons were entitled to a convenient time, which would certainly cover the two days in question. And in 1754, the judges lean against an allowance of even ten days for the privilege, and allow it only because not opposed. Referring to the abridgments and digests of the law, we find in Bacon's Abridgment (the first edition of which was published in 1736 to 1759, second in 1762, third in 1768, fourth in 1778, and fifth in 1798) the law thus stated under the head of privilege 4. "As to the exact continuance of this privilege, it seems, in good measure, unsettled to this day. It is, indeed, agreed in most books that members of parliament have privilege *eundo, morando et redeundo*, and that they are entitled to privilege as well after a dissolution, as a prorogation of the parliament." "By two orders of the house of lords, one dated the 28th day of May, 1624, the other the 27th of January, 1628, it is declared that the privilege commences from the teste of their writ of summons to parliament, and that upon every session and prorogation, their privilege is for twenty days before and twenty days after each session, which, one of the orders says, is time enough for them to come from all parts of the realm, and to return. But the commons never assented to this, for they claim forty days before and after each session." It then cites Colonel Pitt's case, saying that the court did not think it necessary in the determination of this cause to ascertain the exact time of privilege that members of parliament were entitled to, after a dissolution of parliament. Comyn's Digest, the first edition of which was published in 1762-67, says, Parliament D. 17: "The privilege of a peer commences from the teste of the summons, and continues for twenty days after the session, and so for twenty days before and twenty days after every session upon prorogation." R. by the lords, 28th May, 1624, and 27th January, 1628; 2 Levinz, 721; Keble, 329. But the commons claim forty days before and after every session. A subsequent editor, probably, inserts "on the dissolution of parliament, the members have privilege *redeundo* for a reasonable time." *Pitt's Case*, 7 and 87; Fort. 139; Str. 985; B. B. & H. 28. These writers, stating that the law is unsettled, that the period is a reasonable time, call the forty days merely a claim of the house of commons. Blackstone is the first and only writer to pronounce it law. He says, I. 165, probably the first edition in 1765: "Privilege of exemption from arrest is in a commoner by the privilege of parliament for forty

days after every prorogation, and for forty days before the next appointed meeting," for which he cites only 2 Levinz, 72. Hatzell's Precedents, the first volume of which is a collection and discussion of cases of privilege, published in 1776, repeatedly states (as see the citations in its index and elsewhere) that the duration of privilege is uncertain. From the state of the law as found in the journals and resolutions of the two houses, and in the decisions of the courts, and in those abridgments and digests which have always been considered its trustworthy expositors, and from the conclusions stated and verified in the chief, if not the only work on the subject of privilege at the time of the adoption of our constitution, notwithstanding the remark of Blackstone, which illustrates, by examining his citations, the inaccuracy which others have observed in the legal statements of this elegant commentator.

From this review of the law and its literature, as it stood at the time of the adoption of the constitution, we certainly cannot say that the language used in the constitution had such a fixed and well known legal meaning that those who adopted the constitution must have been supposed to know that the phrase "during their attendance upon the session of their respective houses, and in going to and returning from the same," included a period of not less than forty days before and after each session. Had the case of *Barnes v. Ward*, or either of the seven reports of *Holliday v. Pitt*, or *Barnard v. Mordant*, or the action of the house of commons in 1586 and in 1640, to which we have referred, or even the report of the chancery cases of the Earl of Athol against the Earl of Derby, been before the only writer previous to 1786, who stated that forty days was the right of a commoner, he would not, upon a reporter's observation of a point not under judicial inquiry, have stated that such was the law. But upon his statement, the opinion of the large number of intelligent men, whose knowledge upon questions of law is not more exact or profound than can be acquired in the pages of Blackstone, would be sufficient, coupled with the constantly growing power of the house of commons, to have created that general belief, of which May speaks in the page and volume to which we have been referred. And, indeed, in the first edition of his work, published in 1844, May says upon this very subject, that the precedents by no means establish this extent of privilege to be either the law or the practice, and leaves the matter altogether in doubt. We are, therefore, brought upon this declaration of Mr. May to the case of *Gowdey v.*

Hoppin v. Jencke.

Duncombe, 1 W. H. & G. 430, decided in the court of exchequer in 1847, as the first case in which, even in England, this right to forty days is declared to be law. That learned court asserts: "We think that the conclusion to be drawn from all that is to be found in the books is this, that whether the rule was originally for a convenient time or for a time certain, the period of forty days before and after the meeting of parliament has, for about two centuries at least, been considered either a convenient time or the actual time to be allowed. Such has been the usage, the universally prevailing opinion on the subject, and such, we think, is law." The assertion that from the books it appears that such has been the law for two centuries at least, must be considered as made in regard to the books before them, which appear either in the opinion of the court, or in the argument of counsel, and not in regard to the books not before them. The books not before them are the house journals of 1640, to which we have referred, stating the time to be sixteen days, the case in *Siderfin*, 1660, which holds that forty days were not to be allowed, none of the seven reports of *Holliday* and *Pitt*, nor the case of *Barnard and Mordant*. They have before them and rely upon *Blackstone's Com.* the case of *Athol v. Derby*, and *Levinz* (as cited by *Blackstone*). They say that in *Bacon's Abridgment* the authorities are collected. They mention an Irish statute, which limits the time to forty days, and an English statute, which does not mention the duration of the privilege. They speak, also, of the franking privilege as limited by statute to forty days. They refer to the case cited from *Dewes' Journal*, as given at large in *Bacon's Abridgment*, and, as having some tendency to support the view, that the rule was for a convenient period. They refer, also, to *Jenkins' Book of Centuries*, which we have not been able to find, as stating the privilege to be forty days. But that statement, compared with the *Year Book*, to which it refers, will be found to have been made with less reason than *Blackstone's* statements. This is all upon which that court must be deemed to have founded the opinion as to the law for two hundred years in England. *PRYNNE*, in his *Brief Animadversions*, speaking of the Irish statute quoted by the court, says: "The Irish parliament allowed forty days because of the danger by Irish rebels." *Prynne's* 4 Reg. 1216, is quoted as denying the right, but we have not been able to test the citation. If the proceedings in the house of commons and in the courts, which we have cited at length, and which were not

called to their attention, had been before the court in *Duncombe's* case, they could not have made that declaration as to the history of the law for two hundred years, as found in the books. While we accept the decision as conclusive evidence of the law of England to-day, we cannot, for the reasons given in this opinion, accept it as conclusive evidence of what the law has been in England for more than two centuries, or that such was the law of England at the time of the adoption of the constitution of our own country.

From this examination of the proceedings of parliament, of the decisions of the courts, and of the law writers of England, we feel justified in saying that there is a weight of authority sufficient to overbalance the observation of Blackstone, or even that of the court of exchequer in *Duncombe's Case*, and sufficient to justify us in saying that the law in England at that time upon the subject of the duration of privilege of members of parliament was, that it was for a reasonable or a convenient time, and not for a period of forty days and more, as claimed by the defendant.

We now turn to another aspect of this subject, of more importance than the one which we have considered, and that is the inquiry, how this matter was understood and considered in this country at and subsequent to the time of the adoption of the constitution, so far as can be learned from the language of our own writers, the decisions of our own courts and the action of the house of congress. And upon this subject the defendant presents us with a report of the judiciary committee of the house in the *Case of Culver*, at the session of the thirty-ninth congress, which report, he says, was unanimously adopted by that body.

That report, after quoting the provision of the constitution under consideration, says: "This privilege, which is borrowed from the law and custom of parliament, is of such high antiquity in England as to be absolutely lost in the night of time, and to stand, therefore, rather upon prescription as claimed by the commons in the 17th of Edward IV, than on any positive law, although recognized in statutes as old as Ethelbert, Edward the Confessor, and Canute." We have nowhere else found any reference to the existence of any such statutes. Canute died in 1035, just two hundred years before the oldest statute now extant, that of Merton, 20th Henry III, 1235. Nor do we suppose that from any such statutes, so long preceding the Norman conquest, much real light could be obtained as to the privilege of members of congress in our day.

Hoppin v. Jenckes,

The report further states, that "parliament is the sole judge as well as the zealous guardian of its laws, customs and privileges." We are aware that many judges, especially in the earlier times, near the period of the English revolution, have thus expressed themselves, but we understand that with the growth of the English constitution this claim has been overshadowed, if not extinguished. The countless forms in which the so-called privilege was exercised in the time of the long parliament, and those which immediately preceded it, have diminished to the few and simple claims of freedom from arrest or summons and freedom of speech, and even these have been limited and controlled by statute, as we have seen, among other instances, in the 12th of William III, chapter three, and the 10th of George III, chapter fifty. And the struggle within our own time between the courts and the house of commons, as to the privilege claimed for the publication of their proceedings, must be fresh in the memory of all. The courts held, by the judgment of Chief Justice DENMAN and his associates, that such publication was not privileged in an action for libel. The house of commons asserted, by journal resolutions, the doctrine that their publications were privileged, but though they had directed their publisher to appear and plead before this court, they did not carry up the case from the unanimous judgment of the four judges of the queen's bench to the ten judges in bank or the house of lords. For a time the officers of the law were subjected to directly opposite commands from the house of commons and from the courts; and many actions were "most unreasonably brought," as observed by Lord DENMAN himself, in which juries, whose English hearts burned within them (again to quote his words), by their verdicts sustained the courts. But finally, with a wisdom characteristic of constitutional government, an act was passed which defined the rights at law in regard to such publications. These and other instances show that privilege, like prerogative, however haughty and self-asserting at times, has, with increasing frequency, bowed to the yoke of the law. The report further observes "that in regard to the time allowed for going and returning, although it has generally been considered to extend to forty days in either case, they (parliament) have refused to determine any more than that it shall be a convenient one." How correct this statement may be, we have already considered. The report proceeds: "There is no question here, however, as to the duration of privilege," so that, at all events,

Culver's Case does not turn upon the question of time, which we are now considering. Nor must we necessarily understand, by the language of the report which we have quoted, that they claim the same rights for either house of congress as are attributed to parliament. If it is, however, to be considered, as claimed by the defendant, as an emphatic and weighty declaration by the house of representatives of its opinion upon this subject of privilege, it becomes us carefully to consider whether those opinions have any better foundation in American law than that which they have for their statements as to the law of England. It appears, then, in the first instance, that in the convention which adopted the constitution there was no debate upon this provision. Neither in the *Federalist*, nor in any other discussion to which we have had access, is any mention made of any such supposed duration of privilege as is now claimed to have been generally considered at least to have been legally implied in the terms of this clause of the constitution. It is hardly possible, that in a body so jealous of privilege as the convention that formed the constitution, or in those State conventions, still more jealous, which discussed its adoption or rejection, or among the lawyers and statesmen who counseled the people at this critical hour of our history, it certainly is not possible, if such had been generally considered to be the duration of a member's privilege, that it should thus have entirely escaped observation. Among the commentators upon American law, Chancellor KENT makes no observation upon this subject—he merely repeats that provision of the constitution in its terms. The learning of Judge STORY in the history and law of England seems to have been present to his mind, when, in his work on the Constitution, § 862, he used the following remarkable language: "It is also confined in all cases to a reasonable time, *eundo, morando et redeundo*, instead of being limited to a precise number of days. It was probably from a survey of the abuses of privilege, which for a long time defeated in England the purposes of justice, that the constitution has thus marked this boundary with a sedulous caution." From the acquaintance of Judge STORY with American constitutional law, and his copious style of discussion, he would not have failed to remark upon the claim now made, had any such been called to his attention, either in his reading or personal acquaintance with the eminent men who constructed or expounded that constitution. There are some early cases in the reports in this country from which the same inferences may be drawn.

Hoplin v. Jenckes

One already mentioned is *Lewis v. Elmendorf*, 2d Johnson's Cases, 222 (1801). The court, of which KENT was a member, says: "This privilege is to be taken strictly, and is to be allowed only while the party is attending congress or is actually on his journey going or returning from the seat of government." The claim of the defendant was that he was to be allowed twenty miles a day for traveling. In *Cox and McClenachen v. Houston*, 2 Dall. 478, decided in 1788, the defendant, a member of congress, having claimed his privilege to be discharged, the parties agreed that he should be surrendered within four days after the session of congress, "and the court declared their approbation of the compromise, as affording a good precedent for future cases of the same kind." In the case of *Bolton v. Martin*, 1st Dall., decided in 1778, the court, speaking of the right of members of parliament, say "during the recess within the time of privilege, which was a reasonable time *eundo et redeundo*;" and they also inferred, it was clear, from certain statutes of Pennsylvania, that its legislature so understood the privilege of parliament. These are all the references and decisions of the courts in this country to which we have been referred by the diligence of counsel, or have found ourselves. Of the recent text-books in this country, we will first quote from Cushing's Law and Practice of Legislative Assemblies. This author, after reciting the privilege of parliament as being forty days, says (section 582). "In the federal government and in many States, members are privileged whilst going and returning, merely, without other limitations of time. Where the duration of the privilege is thus stated, members are entitled to a reasonable, or, as it was expressed by the house of commons on occasion, a *convenient* time for going and returning. Thus they are not obliged at the close of the session to set out immediately on their return home, but may take a reasonable time to settle their private affairs and prepare for the journey; nor will the privilege be forfeited by reason of some slight deviation from the most direct road." The Manual of Parliamentary Practice published by authority of the house of representatives in 1860, states the rule as follows (page 54): "The time necessary for going to and returning from congress not being defined, it will, of course, be judged of in every particular case by those who will have to decide the case. While privilege was understood in England to extend, as it does here, only to exemption from arrest, *eundo morando et redeundo*, the house of commons themselves decided that a convenient time

was to be understood (1580) 1 Hats. 99-100. Nor is the law so strict in point of time as to require the party to set out immediately on his return, but allows him time to settle his private affairs and to prepare for his journey, and does not even scan his road very nicely, nor forfeit his protection for a little deviation from that which is most direct, some necessity perhaps constraining him to it. 2 Str. 986-987."

We ought to interpret the report in *Culver's Case* in accordance with these rules, if such construction be possible, so long as the rule is not rescinded. The distinction between the powers of parliament and those of congress, under the constitution, are so marked that they do not require comment. Nor can we presume that either house of congress would overlook that distinction upon this subject. Notwithstanding, therefore, the inference drawn by the defendant from the language of the report in *Culver's Case*, we hold it to be clear that the construction in this country of this clause of the constitution, at the time of its adoption and since, has been inconsistent with the idea that the duration of this privilege was for a period of forty days before and after each session.

We have discussed, it may seem, at unnecessary length, the question presented by this plea; but it called for a consideration of the law of England as to the duration of the privilege from arrest of a member of parliament, and also the consideration of a clause of the constitution of our country adopted from the parliamentary law of England. It is not enough in such cases to be content with what may be termed a common-sense interpretation, or with a mere dissent from the opinions expressed or implied of such high authority as have been quoted to us. A court must satisfy itself by deeper and more thorough inquiries whether the obvious interpretation, or the one suggested by such learned minds, is the true one. Any question which concerns the real spirit and exact meaning of any clause of the constitution of our country is to be approached by a court with a reverent spirit, which will think no labor unnecessary that tends to make clear the rights or the obligations declared in the great charter of the republic.

Our conclusion, therefore, is to overrule the plea, as founded upon the supposition that the duration of privilege from arrest was forty days or more before and after each session of congress; because the duration of this privilege, as defined in the constitution, is understood by this court to be limited to a reasonable and convenient

 In the Matter of Reynolds.

time, in addition to the actual session of congress, for each member to go to and return from such session.

**IN THE MATTER OF REYNOLDS, PETITIONER FOR THE BENEFIT OF THE
INSOLVENT LAW.**

(S R. L. 425.)

Bankrupt law and State insolvent law.

The passage of the bankrupt law of the United States, of 1867, suspended the operation of a State insolvent law, so far as the provisions of the former applied to the subject-matter of the latter.

THE creditors appearing to oppose the petition of Gideon Reynolds for the benefit of the insolvent law of the State, filed a motion to dismiss the petition upon the ground that the jurisdiction of the court over such cases had ceased to exist after the passage of the bankrupt law of the United States in 1867, it being apparent upon the record that the petitioner's debts exceeded \$300.

James Tillinghast, for creditors.

1. The exercise by congress of its constitutional powers to establish a uniform law upon the subject of bankruptcies throughout the United States, supersedes State legislation upon the same subject. *Sturgis v. Crowninshield*, 4 Wheat. 122; *Ex parte Eames* 2 Story, 322; *Griswold v. Pratt*, 9 Met. 16; *Commonwealth v. O'Hain*, Am. Law Reg., Oct., 1867, p. 765; see, per SHAW, C. J., *May v. Breed*, 7 Cush. 40.

2. State insolvent laws which discharge the person of the debtor from arrest only, as well as those which discharge the debt, are suspended by the act of congress; there is no real distinction between them in this respect. See above cases, also 3 Story on Const. p. 4 § 1100 to p. 15, § 1110; 2 Kent's Com. 370, *et seq.*; Hill. on Bankruptcy, p. 11, § 21. Compare *Adams v. Story*, Paine C. C. Rep. 79, where the New York act of April, 1811, is held to be an *insolvent act*, with *Blanchard v. Russell*, 13 Mass. 4, where it is stated by PARKER, C. J., to be clearly a *bankrupt act*, and with *Sturgis v. Crownin-*

shield, 4 Wheat. 122, where MARSHALL, C. J., expressly declines to decide which it is, whether an *insolvent* or a *bankrupt* act.

W. Hays & C. Matteson, for the petitioner, cited *Ex parte Eames*, 2 Story, 322; *Griswold v. Pratt*, 9 Met. 16; *Sturgis v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *Sturgis v. Crowninshield*, 4 Wheat. 194.

BRADLEY, C. J. This is a motion to dismiss the petition of Gideon Reynolds for the benefit of the insolvent law of the State, upon the ground that this law, in its operation in favor of insolvents whose debts exceed the sum of \$300, was suspended by the passage of the bankrupt law of the United States, now in force.

The decision of the motion upon this ground depends upon the construction of the provision of the constitution of the United States which declares that "The congress shall have power to establish uniform laws upon the subject of bankruptcies throughout the United States." Art. 1, § 8.

In considering this question, of an alleged conflict of these laws, we naturally inquire first, whether the provision of the constitution which we have quoted confers the power upon congress to the exclusion of a similar power in the States. If it does not prohibit the power in the States absolutely, does it limit the exercise of that power either to time or subject, when and upon which congress has not legislated? or does it restrain the laws of the State only from acting upon those cases upon which the law of the United States may be called into exercise? And if the two jurisdictions thus come in conflict in particular cases, is that which is prior in time to prevail, or that of the United States, by any paramount power conferred upon it by this clause of the constitution? Another class of inquiry arises as to the scope and extent of legislative power conferred upon congress in the phrase "subject of bankruptcies."

The first class of these questions was early determined by the supreme court of the United States, in *Sturgis v. Crowninshield*, 4 Wheat. 122. It is not the mere existence of the power (they say), but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States. And they decided "that until the power

In the Matter of Reynolds.

to pass uniform laws upon the subject of bankruptcies be exercised by congress, the States are not forbidden to pass a bankrupt law." Mr. Webster, in his argument in *Ogden v. Saunders*, 12 Wheat. 213, said, "the argument used in *Sturgis v. Crowninshield* maintained that the prohibition of the constitution was leveled only against interference in individual cases, and did not apply to general laws." Yet the court rejected that conclusion, and also held "that the provision of the constitution in question did not exclude the right of the States to legislate on the same subject, except when the power is actually exercised by congress, and the State laws conflict with those of congress."

To state the decision precisely in the language of the certificate in the first case, and as reaffirmed in the second, we find the law to be "that a State has authority to pass a bankrupt law, provided there be no act of congress in force to establish a uniform system of bankruptcy conflicting with such law." In *Hoyle v. Zacharie and Turner*, 6 Pet. 638, the court say, "these decisions are final and conclusive."

We come then to the second inquiry: What is the extent and scope of the power of congress, by force of the provision to legislate upon the subject of bankruptcy? Does it include the power to legislate upon insolvency as defined in the law? The bankruptcy statutes and the insolvency statutes of England provided respectively: 1st. The bankrupt process was moved by creditors against certain classes of debtors for a distribution of the bankrupt's property among all the creditors through the officers of the court, and it provided for a discharge of the debt as well as the person of the bankrupt. 2d. The insolvent laws authorized the debtor, and a much larger class of debtors, including those liable to proceedings in bankruptcy, to move the process for such distribution of his property, but discharged only the person of the debtor and did not discharge the debt. The case of *Jilles, assignee of Routledge, v. Montford*, 4 Barn. and Ald. 121, illustrates the operation of these two systems upon one and the same person in England.

The bankrupt law of 1841 was the first one passed by congress which introduced the system of an insolvent law in conjunction with that of bankruptcy as exercised in English statutes.

The constitutionality of the law of 1841 was contested upon this ground. It was claimed that the insolvency provisions of that law were not authorized by the constitutional power to pass laws upon

the subject of bankruptcies. The cases of *Kanster v. Kohans and Visser*, 5 Hill, 317, and *Sackett v. Andross*, same volume, in the opinions of Mr. Justice COWEN sustaining the law (Chief Justice NELSON concurring in the decision), and of Mr. Justice BRONSON, *contra*, exhibit the grounds of this controversy with great fullness and eminent ability. The court decided that the grant of power in the constitution was intended to be as broad as the subject itself, and that it was not limited to the statute modes in which that power had been theretofore exercised by parliament. They, therefore, sustained the voluntary insolvent part of the law. The broadest interpretation of the clause seems to have prevailed in the country, throughout the various circuits, in the opinions of the circuit judges, as the supreme court had held that, under that law, questions could not be taken to that court, either upon certificate of division of opinion or an appeal or writ of error. *Nelson v. Carland*, 1 How. 265. The judges of that court seemed to have concurred in the opinion of Mr. Justice CATRON, in a note to the preceding case—*Klein's Case*. He held that the subject of bankruptcies spoken of in the constitution was a subject of extensive and complicated jurisdiction; that "it extends to all cases where the law causes to be distributed the property of the debtor among his creditors. This is its least limit. Its greatest is a discharge of the debtor from his contracts; and all intermediate legislation affecting substance and forms, but tending to further the great end of the subject, distribution and discharge, are in the competency and discretion of congress." He further says, "I deem every State law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors, and it is especially such if it causes the debtor to be discharged from his contract within the limits prescribed by the case of *Ogden v. Saunders*." Such a law may be denominated an insolvent law. Still it deals directly with the subject of bankruptcies, and is a bankrupt law in the sense of the constitution, and if congress should pass a similar law it would suspend the State law while the act of congress continued in force." Judge STORY, in *Ex parte Eames*, 2 Story, 322, held, in a case of conflict of title under the State insolvent law of Massachusetts and the bankrupt law of '41, that the title under the State law must give way to the paramount title derived from proceedings in bankruptcy. That State law, containing the involuntary as well as voluntary provisions, and discharging the debt as well as the

In the Matter of Reynolds.

person, was in every sense, though not in name, a bankrupt law, and in the collision, occurring in carrying out the provisions of the different systems, the decision was, under the authority we have considered, inevitable.

But the judge goes further and declares that, as to the proceedings in future cases, "both systems cannot be in operation or apply at the same time to the same persons, and where the State and national legislation upon the same subject and the same persons come in conflict, the national laws must prevail and suspend the operation of State laws. This, so far as I know, has been the uniform doctrine maintained in all the courts of the United States." And after citing the cases of *Sturges v. Crowninshield* and *Ogden v. Saunders*, he says, in conclusion, "the moment that the bankrupt act does or may operate upon the person or case, that moment it virtually supersedes all State legislation." In the case of *Griswold v. Pratt*, 9 Met. 16, the court fully consider the question, "whether the enactment of a bankrupt law does *ipso facto* suspend and abrogate, during the continuance of such law, all general insolvent laws of the several States, so far as they have reference to future cases, and are applicable to the same persons, the same contracts and the same assets as are made subject to proceedings under the bankrupt law." And they decide that question in the affirmative as applicable to the insolvent law of Massachusetts; "considering (they say) our State insolvent law to be a system introduced for the purpose of sequestering the effects of an insolvent debtor and of discharging him from all debts contracted after the passage of the law, we are satisfied that the two systems cannot stand together," and that the bankrupt law suspends the State law.

The courts of Maryland came to the same conclusion in regard to the insolvent laws of that State. In the case of *Larrabee v. Talbot*, 5 Gill, 428, the court, quoting fully from the opinion of Judge STORY in *Ex parte Eames*, decide that the bankrupt law of '41 "did not suspend the operation of the State insolvent laws until the day it went into effect."

So, in Louisiana, the courts, speaking of their insolvent system, wherein a debtor makes his *cessio bonorum* to a judge for the benefit of creditors, and syndics are appointed to distribute the property, say: "This power was specially delegated to congress and only reserved by the several States in so far and so long as congress did not see fit to exercise it. The moment they exercised the power, the

State laws upon the subject became inoperative and were suspended.” A similar decision is reported in the Law Register for October, 1867, page 765, in Pennsylvania, by the district court for the Alleghany district, with the concurrence of the judges of the common pleas of that State, upon the insolvent laws of that State, which only discharged the debtor from imprisonment and did not release the debt.

The court in North Carolina seems to have taken a different view in the *Ziegenfuss Case*, 2 Ired. 463. We have not been able to examine the opinion, nor have we been referred to or found any other decision concurring with it.

Our State insolvent law authorizes, upon the application of the debtor, proceedings for the distribution of his property only and the discharge of his person from imprisonment. It does not release the debt. The bankrupt law of 1867 does all this upon such application, and also releases the debt.

Assuming the constitutionality of the bankrupt law in other respects, which has neither been discussed nor denied before us, we must hold that, under the decisions and concurring practice to which we have referred, these provisions of the bankrupt law authorizing a debtor to apply for and obtain a discharge of his debts, and providing for a distribution of all his property among all his creditors, are within the legislative power of congress under this grant in the constitution; the system, differing in this department only from our insolvent law in extending the release, but not at all in the provisions for taking possession, through officers appointed by the court, of the entire property of the insolvent and distributing it among all his creditors, covers all the provisions of our insolvent law. It legislates for all of them, and for more in its voluntary department, and adds thereto the involuntary department of the law enabling creditors to move for all these processes against the debtor in their own behalf. We must, therefore, find that congress has, within its constitutional powers, legislated upon the entire subject of our insolvent laws. And such legislation, it has long been settled, when exercised, suspends the State legislation upon the same subject. We must, therefore, grant the motion.

We may remark that this decision does not cover the law of the State for the discharge of poor debtors from imprisonment. Such laws in this State were adjudged constitutional in the case of *Mason*

Tillinghast v. Wheaton.

v. *Hall*, 12 Wheat. 370, by the supreme court, after the decisions in *Sturgis v. Crowninshield* and *Ogden v. Saunders* had been rendered.

TILLINGHAST, Administrator, v. WHEATON, Executor.

(8 R. L. 536.)

Gift. Savings bank book.

The delivery of a savings bank pass-book containing the entries by the officers of the bank of the moneys deposited by a deceased wife, with a parol gift of the same by surviving husband when in *extremis*, is a valid *donatio causa mortis* of the money deposited in the bank.

THIS was a bill brought by the administrator of Sarah Crocker, setting forth that one of her sisters claimed certain money deposited in a savings bank as a *donatio causa mortis* to them. That the other next of kin, and the administrator of the husband, also claimed the money, and asking the instruction of the court. The facts are fully stated in the opinion of the court.

James Tillinghast, for claimants.

John P. Knowles, for Wheaton.

DURFEE, J. The bill is brought to determine who is entitled to a sum of money on deposit in the Providence Institution for Savings, in the name of Sarah Crocker, who died August 5, 1865, leaving a husband, who died August 20, 1865, without having taken out letters of administration on her estate. The money is claimed by the brother and sisters of Sarah Crocker, as her next of kin, by James Wheaton, as executor of the last will of John Crocker, and also by Abby Ashton and Jane K. Carpenter, two of the sisters of Sarah Crocker, by virtue of an alleged gift *mortis causa* from Sarah Crocker, or from John Crocker after her decease, and agreeably to her request. The last named is the claim which has been mainly contested, it being virtually conceded that, as between the next of kin of Sarah Crocker, claiming as such, and the executor of John Crocker, the executor has the better right.

Sarah Crocker, at her decease, held, as evidence of the amount

due her from the bank, a book in which her account with the bank was stated by its officers; and it is claimed that the gift was made by a delivery of this book, with words of gift, to Abby Ashton, by John Crocker, into whose hands the book had come, after his wife's decease, accompanied by a letter from her requesting him to divide it equally between Abby and Jane after he had done with it.

In proof of this allegation, William T. Luther was called as a witness, and testified that he was with John Crocker during his last illness, and took care of him; that said Crocker was sick a week or ten days after his wife's decease; that a day or two before he died he saw him give to Mrs. Ashton a book similar to the bank book which was exhibited to the witness (being the book formerly belonging to Mrs. Crocker), and heard him tell her to take it, keep it and take care of it; it was hers. The witness could only say the book given was like the book exhibited to him; not that it was the same. In regard to the note alleged to have been written by Mrs. Crocker, the witness only knew there was a note found in her drawer after she died, and that it was given to Mr. Crocker. The next morning he asked Mr. Crocker if he had read it. Crocker said he had; it was sacred; that anything Sally said should be done—meaning his wife. The witness also testified that Mr. Crocker had considerable gold and silver in the house, which he wanted Mr. Wheaton to dispose of; that Wheaton took the gold, and took a bank book with him; that Wheaton returned and again went away; and that it was two or three hours subsequently that Mr. Crocker gave the bank book to Mrs. Ashton. Wheaton testified as to the alleged letter to Mr. Crocker which was shown him, that there was a letter from Mrs. Crocker of a similar import, but he thought not the same as the one shown him, though he was not sure; and as to the bank book, that Mr. Crocker handed it to him, and that at his request he carried it to the bank to have it transferred to Mrs. Ashton and Mrs. Carpenter; that the bank declined to make the transfer, and he probably returned the book to Mr. Crocker, the witness being old and his recollection indistinct.

Such is the substance of the testimony, and, being uncontradicted, we think it proves that the book delivered to Mrs. Ashton is the book which belonged formerly to Mrs. Crocker, and that it was given by Crocker in contemplation of death, and for the purpose of transferring to the donee the money in bank of which it is the evidence. Such being our conclusion, the question is whether

Tillinghast v. Wheaton.

under the law relating to gifts *mortis causa*, the gift, by simple delivery of a bank book, which in itself is nothing more than the non-negotiable evidence or certificate of the deposit and its increment, can operate as a gift of the deposit and its increment.

It has been uniformly held that bank notes, notes payable to bearer, and other securities and evidence of indebtedment, which are transferable by mere delivery, may pass as gifts *mortis causa*; but in *Miller v. Miller*, 3 P. Wms. 356, it was decided that a note of hand, not payable to bearer, and being a mere chose in action to be sued in the name of the executor, was not the subject of a *donatio causa mortis*. In *Ward v. Turner*, 2 Ves., Sen., 431, it was held by Lord HARDWICKE that a gift of receipts for South Sea annuities was not a good *donatio causa mortis*, principally because the property did not pass by a delivery of the receipts, but a transfer was necessary, which was not made. The doctrine of these decisions has been recognized and approved in other English and in some American cases. *Tate v. Hilbert*, 2 Ves., Jr., 110; *Pennington v. Gittings*, 2 Gill & J. 208; *Bradley v. Hunt*, 5 Gill & J. 54; *Overton v. Sawyer*, 7 Jones' Law (N. C.), 6. But in the more recent English decisions, the strictness of the ancient rule has been much relaxed, and it is stated by Mr. Redfield, who seems to have had access to all the later cases, that it is now fully settled in the English courts that not only are all securities which pass by delivery or by indorsement, when indorsed in blank, the subjects for a valid gift *mortis causa*, but that "even promissory notes and bills not negotiated so as to pass by delivery, and also promissory notes not negotiable, bonds, mortgages, policies of insurance, and all other evidences of indebtedness which may be regarded as representing the debt, may, by a parol gift, and the delivery of the paper by which the debt is evinced, either with or without written assignment or indorsement, constitute a good gift *mortis causa*." 2 Redfield on Wills, pp. 312, 313, and cases there cited. The rule thus deduced from the English authorities has been repeatedly recognized and applied by the American courts. *Brown v. Brown*, 18 Conn. 410; *Waring v. Edmonds*, 11 Md. 424; *Parish v. Stone*, 14 Pick. 198; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Lee v. Boak*, 11 Gratt. (Va.) 182; *Caldwell v. Renfrow*, 33 Vt. 213; and see *Westerlo v. De Witt*, 35 Barb. 215. It is true we find no case which is the exact parallel of the case before us, but the principle declared in the cases to which we have referred is broad enough to include the case before us; and

Aldrich v. Drury.

therefore, whatever, as a matter of wise policy, we may think of the expediency of holding a savings bank book to be the subject of a gift *mortis causa*, we do not see how, as a matter of law, we can hold otherwise. We think the gift a valid gift, and that the donor is entitled to have it perfected, if need be, by the legal representatives of Mr. or Mrs. Crocker.

The answer of Mrs. Ashton and Mrs. Carpenter sets up a claim to the deposit and its increment by virtue of a gift *mortis causa* to them jointly. The evidence shows a gift to Mrs. Ashton alone. There must, therefore, be some amendment of the allegation to correspond with the evidence; or the decree, if entered in favor of both the sisters, must be entered by consent.

ALDRICH v. DRURY.

(S R. L. 554.)

Railroad company — right to soil in constructing road.

A railroad company, or any contractor employed by them to build a railroad, may use any material removed by them in grading the road, either in the adjacent, or, it seems, in other localities, but they have no right to sell such material to third parties.

ASSUMPSIT for price of stone excavated in building a railroad on land of plaintiff and sold by defendant. This cause was tried by the court without the intervention of a jury, upon evidence and argument of counsel, though without briefs.

Edwin Aldrich, for plaintiff.

Thurston, Ripley & Co., for defendant.

DURFEE, J. This action was principally brought for moneys received by the defendant in payment for certain stone which the plaintiff claims to have been his property. It appears from the testimony that the plaintiff was the owner of a tract of land over which a railroad had been located, and that the defendant had contracted to construct a section of the road. While the defendant, in pursuance of his contract, was excavating the plaintiff's land, he struck

Aldrich v. Drury.

a ledge of rock or stone, which it was necessary for him to remove in order to prepare the road bed. The defendant testifies that he asked leave of the plaintiff to deposit the stone on the plaintiff's land, and was refused; and that it was only after such refusal that he sold the stone, with the assent of the railroad company, and under an agreement with them to supply an equivalent for the use of the road in earth. He also testifies that he quarried and sold only so much of the stone as was necessary to make the cut for the road bed. The plaintiff in his testimony denies that he refused the defendant permission to deposit the stone on his land, or that it was asked of him before the stone was sold; and he now claims the proceeds of the sale. The case was tried by the court on the law and facts—the jury trial being waived.

In this case it is not claimed that the railroad company had acquired any right or interest in the land within their location, beyond what such companies usually acquire, which is a right or interest limited to the purposes of the road. R. S., ch. 130, § 17; Redfield on Railw., 2d ed., § 69. This, however, entitles them to use as much of the earth, gravel and stone within their location as they may need for the construction and maintenance of the road, and, as it would seem, to carry the same from one point to another of the road as those uses may require. *Henry v. The Dubuque and Pac. R. R.*, 2 Clarke (Iowa), 288; *Chapin v. The Sullivan R. R. Co.*, 39 N. H. 564.

The property which they have in the land within their location has been likened to that which the public has in a highway; but, owing to the peculiar purposes to which it is subservient, it is and must be in practical effect much more absolute and exclusive. *Hagan v. B. & M. Railway*, 2 Gray, 574; *Conn. & Pass. River R. R. v. Holton*, 32 Vt. 44; Redfield on Railw., 2d ed., § 69. But, nevertheless, it does not extend beyond the exigencies of the road, and, therefore, while it entitles the company to use the earth, gravel and stone within their location for all railway purposes, it does not entitle them to sell any such material. To allow them to sell would be to allow an abuse of their privilege to take land by compulsory process; for the privilege is accorded on the ground that the land is taken for a public use, a railroad being deemed such, and not to sell again either wholly or in part. It is urged in justification of the defendant, that it was necessary, in bringing the road to grade, to make the cut and remove the stone. This may be, but,

in order to do this, it was not necessary for him to sell the stone; and when he did sell the stone, under the sanction of the company, he did that which neither he nor the company had the right to do. Except for the purposes of the road, the stone belonged to the plaintiff; and, therefore, when, with the assent of the company, the defendant sold it, he sold the property of the plaintiff. Accordingly, we think the plaintiff, waiving the tort, may recover the proceeds of the sale in this action.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WILSON, plaintiff in error, v. FORDER et al.

(20 Ohio St. 88.)

Promissory note. Severable considerations. Ratification.

After the dissolution of a partnership, A., one of the partners, without authority, gave a new note in the name of the firm, in renewal of an old six per cent partnership note, and, without intent to defraud, made it to bear ten per cent interest, and included in it an individual liability of B., another partner. D., another partner, subsequently promised to pay the new note, supposing it to be a simple renewal of the old note.

In an action on the new note, *held*, that, as the considerations were severable, D. was liable for the amount of the old note with interest at six per cent.

ACTION on a promissory note by John and George Forder against John S. Wilson, Isaac Wilson and A. Williamson, formerly partners, under the firm name of Wilson, Williamson & Co.

The note is as follows:

"Due John and George Forder, or order, five hundred and eighty dollars, for value received, as witness my hand and seal, with interest at ten per cent from date. March 15, 1856.

"\$580.

WILSON, WILLIAMSON & Co."

Defendant John S. Wilson alone defended. It appeared that the defendants were partners in 1849, 1850 and 1851; that in 1851 they dissolved partnership, and that the note in suit was given by Isaac Wilson, without authority from defendant John S., in renewal of some old partnership notes; that, without any intention to defraud, the new note was made to include an individual note

Wilson v. Forder.

of forty dollars, of A. Williamson; that the old notes, which formed part of the new note, only bore six per cent interest; that the defendant, John S. Wilson, promised to pay the new note, but at the time he so promised he did not see it, and did not know its amount, its rate of interest, or that it included said forty dollars of A. Williamson, but supposed it was simply a renewal of old notes of the firm, at six per cent interest.

Judgment for plaintiff for the amount of the firm notes, with six per cent interest. Defendant, John S. Wilson, took a writ of error.

F. G. Lewis, for plaintiff in error, cited *Palmer v. Dodge*, 4 Ohio St. 21; *Owing v. Hull*, 9 Pet. 829; 1 Parsons on Con. 47; Story on Con. 143, § 164; 4 N. Y. Digest, 766, and authorities there cited.

N. W. Gilson, for defendant in error, cited 23 Penn. 340; 1 Swanston, 338; *Johnson v. Johnson*, 3 B. & P. 162; *Mayfield v. Wadsby*, id. 159; *Robinson v. Greene*, 3 Metc. 159; *Parish v. Stone*, 14 Pick.; *Sterrett v. Creed*, 2 Ohio, 343, 344; *Burt v. Dodge*, 13 id. 131.

WHITE, J. After the dissolution of the firm neither partner was authorized to renew the firm notes. There was no express authority, and the law does not imply it. *Palmer v. Dodge*, 4. Ohio St. 21.

The question in the case is, whether the act of Isaac Wilson, one of the firm, in giving the note in suit, was so ratified as to bind the defendant for the amount of the firm notes surrendered on the renewal, with simple interest from that time.

In answering this question it is necessary, in the first place, to determine whether the note must be treated as an entirety, or whether it may not be apportioned according to the considerations for which it was given.

In *Parish v. Stone*, 14 Pick. R. 198, it was decided that "where a promissory note is given upon two distinct and independent considerations, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned between the original parties, or such as have the same relative rights, and the holder will recover to the extent of the valid consideration, and no further." It was said that "the holder, in such case, recovers on the note, and not on the original consideration."

Wilson v. Forder.

In *Darwell v. Williams*, 2 Stark. R. 145, the action was brought by the drawer of a bill for £19 5s. payable to his own order, against the acceptor. It appeared that the bill was accepted for value as to £10, and as an accommodation to the plaintiff as to the residue. Lord ELLENBOROUGH held "that although with respect to third persons the amount of the bill might be £19 5s., yet as between these parties it was an acceptance of £10 only." The same principle was recognized by this court in *Doty et al. v. The Knox County Bank*, 16 Ohio St. 123. See, also, Byles on Bills, s. p. 98; 1 Para. on Notes and Bills, 211.

The considerations entering into the note now in question are separate and distinct, and we see no good reason why the note may not be regarded as divisible and held valid to the extent that the firm debts constituted the consideration, and invalid as to the residue.

If the note had been signed by the defendant personally upon the understanding that it embraced only the firm debts, he would have been liable to the extent of such indebtedness. So, also, if Isaac Wilson, the acting partner who gave the note, had been previously authorized by the defendant to renew the notes of the firm, and in executing the authority had, by mistake, given the note for too much, the invalidity would only have gone to the excess. In either case the note, in legal effect, would be only *pro tanto* the note of the defendant.

In this case there was no claim that the creditor, or the acting partner in making the note, intended any fraud. The evidence tended only to show that the note in question was given without the knowledge or authority of the defendant; that it included an individual note of a member of the firm other than the one giving the note, and that the firm notes bore only six per cent interest.

It is a maxim of the law that the subsequent ratification of an act has a retrospective effect, and is equivalent to a prior command. It is true that in order to bind the principal he must ratify with a full knowledge of the material facts affecting his rights. But if the note can be apportioned, and is only enforceable to the extent of the firm indebtedness, the defendant had full knowledge, at the time of making the promise, of the facts affecting his liability.

At the time the note in question was given, the firm notes were surrendered by the plaintiffs. The defendant received the benefit resulting to the firm from the surrender of the old notes; and, from

Kleine, Hegger & Co. v. Katzenberger & Co.

aught that appears, took no steps to pay them as he ought to have done, if they were regarded by him as outstanding liabilities of the firm.

On the question of ratification, the conduct of the defendant ought to be liberally construed in favor of the agent. Story on Agency, § 253.

Under the circumstances, and in the absence of any intent to defraud, we think effect ought to be given to the promise of the defendant as a ratification to the extent that he intended when he made the promise. This is but justice to the creditor, and does no injustice to the defendant.

BRINKERHOFF, C. J., and SCOTT, WELCH and DAY, JJ., concurred.

Judgment affirmed.

KLEINE, HEGGER & Co., plaintiffs in error, v. KATZENBERGER & Co.

(20 Ohio, St., 110.)

Chattel mortgage—possession with power to sell.

A mortgage of goods containing a provision allowing the mortgagor to retain possession of them, and to sell them "in the usual retail way," but requiring him to "pay over the money received therefor to the mortgagee as the goods are sold," is, upon its face, a valid mortgage. BRINKERHOFF, Ch. J. and WELCH, J., dissented.

ACTION by Katzenberger & Co. against Kleine, Hegger & Co. to recover possession of specific personal property. The defendants had attached the property in proceedings against one Jacob Kern; plaintiffs claim the goods under a prior mortgage from Kern. The mortgage contained the following provision, which defendants contend renders it invalid on its face: "The said Jacob Kern to retain possession of said goods and chattels, but on default of payment, or any attempt of said Jacob Kern to sell said goods or chattels (except in the usual retail way, and that he will then pay over the money received therefor to the mortgagees, as the goods are sold), or remove them from the county, or from their present location, or upon any seizure of them by any process of law, or upon any failure to comply with the provisions contained in the second covenant of this mortgage, then the said L. Katzenberger

Kleine, Hegger & Co. v. Katzenberger & Co.

and Moses Bing, partners, as L. Katzenberger & Co., may take them into their possession." The case was submitted to the court under the agreement that the issue should depend solely upon the question of the validity or invalidity of the mortgage by reason of this provision; and that if the court found the mortgage to be a valid one, judgment should be entered for plaintiffs for the possession of the goods. The finding was in favor of plaintiffs, and judgment was entered accordingly. Defendants took a writ of error.

Egley & Warden, for plaintiffs in error, cited *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Ransom*, 5 Ohio St. 1; *Harman v. Abbey*, 7 id. 218.

Long & Kramer, for defendants in error, cited *Malloody v. Chandler*, 3 Fairf. 282; *Forbes v. Parker*, 16 Pick. 462; *Welch v. Whitmore*, 25 Me. 86; *Ferguson v. Thomas*, 26 id. 499; *Ford et al. v. Williams*, 24 N. Y. 359; *Miller v. Lockwood*, 32 id. 293; *Gray v. Bidwell*, 7 Mich. 519; *Hitchcock v. St. John*, 1 Hoff. ch. 521; *Nicholson v. Leavitt*, 4 Sandf. 252; *Shattuck v. Freeman*, 1 Met. 10, 14; *Browning v. Hunt*, 6 Barb. 95.

SCOTT, J. The only question in this case is, whether the possession and power of disposition reserved to the mortgagor by the terms of the mortgage necessarily render it fraudulent and void as against his other creditors.

On behalf of plaintiffs in error, it is claimed that the cases of *Collins and McElroy v. Myers*, 16 Ohio, 547; *Freeman v. Ransom*, 5 Ohio St. 1, and *Harman v. Abbey*, 7 Ohio St. 218, have settled the answer to this question in the affirmative.

We fully recognize the authority of those cases, and are not disposed to question the soundness of the principle which they establish. But in ascertaining the principle upon which they rest, we must keep in view the state of facts to which it is applied in those cases, and limit the generality of the language accordingly. In each of those cases the terms of the mortgage were such as to reserve to the mortgagor the right to sell the mortgaged property on his own account. In the first case, the mortgagor retained possession of the stock of goods mortgaged, "for the ordinary purposes of barter and sale," with the full right to use the proceeds of sales, for any pur-

pose whatever, at his own discretion, until condition broken. So in the second case, where goods, valued at \$15,000, were mortgaged to secure a debt of \$519, and the mortgagor "was permitted to remain in possession, and, with the assent of the mortgagee, to go on and sell the mortgaged property, and *deal with it as his own*, after the mortgage was executed," the court held the mortgage void, because "all the beneficial uses of the property, the power to use and dispose of it for his own benefit," were retained by the mortgagor. And it was said there, as in the former case of *Collins v. Myers*, that as the mortgagor "might dispose of the property to a creditor at will, to satisfy a debt, we see no reason why a creditor might not seize it against his will, for the same object." In the case of *Harman v. Abbey*, as well as in that of *Collins v. Myers*, it was attempted to mortgage "a floating stock of goods," the mortgagor being permitted in each case to sell on his own account and to replenish the stock, with an agreement that the mortgage lien should attach to and cover all subsequent additions to the stock. This was held to be inconsistent with the idea of "a certain security upon *specific* property." In this last case of *Harman v. Abbey*, the mortgagor was allowed, by the terms of the mortgage, to continue selling the goods at retail, and the only restriction upon his power to dispose of the proceeds at his pleasure was, that he was "not to withdraw any portion thereof from the business, beyond the amount of necessary expenses." This arrangement evidently contemplated that creditors who had become or might become such in the course of "*the business*" might be paid from the proceeds of sales, at the pleasure of the mortgagor.

When it is said, therefore, in those cases, that a mortgage of personal property, with possession and a power of disposition reserved to the mortgagor, is fraudulent and void as against his other creditors, we are to understand this as referring to a power of disposition *for the mortgagor's own benefit*. It is only where the power of sale is such as to leave in the mortgagor a dominion over the property, inconsistent with the alleged lien of the mortgage, that the latter has been held *per se* fraudulent and void. In none of these cases was it necessary to go further; and this is the extent of the authorities cited in their support.

But in the present case no power of disposition for his own benefit was left in the mortgagor. So far from permitting him to exercise the rights incident to absolute ownership, the terms of the mort-

Meara's Administrator v. Holbrook and Rosevelt.

gage allow him to sell the property only *in the usual retail way*, and require him to "*pay over the money received therefor to the mortgagees as the goods are sold.*" The fact that the goods may be thus sold for the sole benefit of the mortgagees, and the proceeds applied in discharge of the mortgage debt, is entirely consistent with the idea of a lien upon the goods for the security of the mortgagees. And the fact that the proceeds cannot be applied otherwise, at the pleasure of the mortgagor, is inconsistent with the idea of his absolute ownership.

That the mortgagor should thus act as the agent of the mortgagees in selling the goods for their benefit, is not necessarily in fraud of the rights of other creditors, and, if the transaction is *bona fide*, it is difficult to see why it should not be upheld. Such an arrangement raises only a question of good faith, to be determined by the jury in the light of all the evidence, and is not *per se* fraudulent. *Ford v. Williams*, 24 N. Y. 359; *Miller v. Lockwood*, 32 id. 293; 1 Par. on Con. 571.

A majority of the court think the judgment below must be affirmed.

WHITE and DAY, JJ., concurred.

BRINKERHOFF, C. J., and WELCH, J., dissented.

MEARA'S ADMINISTRATOR, plaintiff in error, v. **HOLBROOK AND ROSEVELT**, Receivers.

(20 Ohio St. 137.)

Receiver of railroad — liability for injury to employee.

A receiver operating a railroad is answerable in his official capacity for an injury to a servant employed on the railroad by reason of the negligence of the receiver, or the negligence of his agents in a position superior to that of the servant; and in determining the receiver's liability and the servant's right to recover, the same rules are to be observed as would be applicable were the company exercising the same powers of operating the road.

ACTION to recover damages for negligently and wrongfully causing the death of plaintiff's decedent, Martin Meara, a railroad employee.

Meara's Administrator v. Holbrook and Roosevelt.

The action was originally commenced against Holbrook and Roosevelt as receivers of the Columbus, Piqua and Indiana Railroad Company, who were operating the road at the time decedent was killed. Subsequently, the railroad company was made a party defendant. The questions considered in the opinion arise on demurrers to the petition, and relate principally to the liability of the receivers in their official capacity. Judgment below was for defendants; plaintiff took a writ of error.

R. A. Harrison, with *John L. Green*, *George L. Converse* and *Francis Collins*, for plaintiff in error, cited *C. C. & C. R. R. Co. v. Keary*, 3 Ohio St. 202; *McGatrick v. Wason*, 4 id. 566; *M. R. & L. E. R. R. Co. v. Barber*, 5 id. 541; *Railroad Co.'s v. Webb*, 12 id. 475; *Brydon v. Stewart Marg*, H. L. 30; *Fifield v. Northern R. R. Co.*, 42 N. H. 225; *Ballou v. Farnum and others*, 9 Allen, 47; *Laugher v. Painter*, 5 B. & C. 347; *Fenton v. Dublin Steam Packet Co.*, 8 Ad. & El. 835; *Quarman v. Burnett*, 6 M. & W. 509; *Dalzell v. Taylor*, 1 El. & Bl. 906; 6 Bac. Abr. 180; 5 Bing. 91; S. & R. on Negligence, §§ 75, 168, 178, 375, and cases cited in note; *Rush v. Williams*, 3 H. & N. 308; 4 Comst. 392; *Cooley's* Con. Lim. 361, and authorities cited; *Story on Agency*, §§ 319 *b*, 320; *Hall v. Smith*, 2 Bing. 156; Code, §§ 256, 263; *Rogers v. Conner*, 2 Bibb. 190.

Henry C. Noble, for defendants in error, argued: 1. A receiver as such, is not liable in an action for damages for the negligence of his employes in the discharge of his official duties. *Noe v. Gibson*, 7 Paige, 513; *Angel v. Smith*, 9 Ves., Jr., 335; *Connell v. Vorhees*, 13 Ohio, 523; *Coe, Trustee, v. C. P. & I. R. R. Co.*, 10 Ohio St. 380, 381; *Story on Agency*, § 319.

2. If such receiver is not held to be "a public officer," he is then only an agent, and is not liable for omissions of duty. *Henshaw v. Noble*, 7 Ohio St. 226, 231; *Lane v. Colton*, 12 Mod. R. 488; *Brown v. Lent*, 20 Vt. 529; *Stone v. Cartwright*, 6 Term R. 411; *Scott v. The Mayor, etc.*, 39 Eng. Law & Eq. 477; *Com'rs of Hamilton County v. Mighels*, 7 Ohio St. 109; 10 id. 403; *De Groot v. Jay* 9 Abb. Pr. 364; *Hall v. Smith et al.*, 2 Bing. 156.

3. The remedy is by petition to the chancellor *pro interesse suo*. *Noe v. Gibson*, 7 Paige, 513, 515; *Parker v. Browning*, 8 id. 390.

Mears's Administrator v. Holbrook and Rosevelt.

DAY, J. It is claimed that whatever remedy the plaintiff may have, arising from the negligence of the receivers or their employes, it can be obtained only by application to the court that has control of the receivers, and not by action against them.

In accordance with the practice of courts of equity, undoubtedly all proper protection may be extended to receivers by the court appointing them; but, as held in *Parker v. Browning*, 8 Paige, 388, where a complaint is made against a receiver for an injury sustained by reason of negligence in the exercise of his official duties, the court may either itself take cognizance of the complaint and administer justice between the parties, or may allow the party aggrieved to bring his action for the alleged injury.

The latter mode of obtaining redress is especially allowable and proper in this State; for, instead of the receiver being turned over to an action against him personally, our Code of Civil Procedure confers on him, "under the control of the court, power to bring and defend actions in his own name as receiver." Code, § 256.

It appears, in the case before us, that the action was brought against the defendants in their capacity as receivers, by leave of the court, and that they entered their appearance pursuant to an order of the court, and defended in their official capacity. This, in its practical effect, is but a statutory form of procuring redress, substantially the same as that under the practice in courts of chancery, where it was ordinarily obtained by proceedings *pro interesse suo*. There is, therefore, no available objection to the mode of procedure.

In this State, a receiver is appointed under the express authority of the statute; and among the powers thereby conferred upon him, as we have seen, is that of bringing and defending suits "in his own name, as receiver." His capacity, then, of suing and being sued "as receiver" is a power conferred upon him by the statute, and is plainly distinguishable from that of a personal character. His *status* in this respect is like that of an administrator, and is analogous to that of a class of *quasi* corporations, which are authorized to conduct legal proceedings in the name of their officers. He neither acquires thereby an individual benefit, nor is he subjected to a personal liability. Whatever he acquires by suit belongs to him officially, and satisfaction of judgments against him can be obtained only from the fund in his hands as receiver, as directed by the court appointing him. Inasmuch, therefore, as the

Meara's Administrator v. Holbrook and Roosevelt

suit is brought against the defendants in their official capacity, it is not necessary to consider the extent of their personal liability, further than it may affect the question of their liability as receivers in this action.

It is claimed that, notwithstanding the court granted leave to bring the action against the receivers, they are not thereby debarred from insisting upon any defense that would otherwise be available to them. It is therefore claimed that the action cannot be maintained, because the receivers are public officers, and are not answerable, in their official capacity, either for their own negligence or that of their employees.

A receiver, it is true, is an officer of the court appointing him; but it does not follow that he is a public officer, exempt, as such, from liabilities for injuries sustained by the negligent discharge of the duties imposed upon him.

If this were a suit to make the receiver personally answerable, the case would come more nearly within the reason of the rule insisted on; but there is little foundation for the claim where this cannot be done.

It has been much questioned as to who are servants of the public, within the meaning of the rule that public officers are not answerable for the negligence of their employees. We are referred to English cases applying this principle to commissioners appointed by the government to construct and have the custody and care of public works. *Hull v. Smith*, 2 Bing. 156. "The members of these commissions were not generally, until recently, incorporated, and their services were unattended by any compensation. To compel such officers to pay out of their own private means the damages resulting from the negligence and omissions of duty of the numerous servants and agents in their employ, was felt to be a great hardship. And on grounds of public policy, the courts, considering them servants of the public, placed them under the protection of the rule, and exempted both their personal and their trust funds from liability." S. & R. on Negligence, § 177.

"But the questions involved in these cases have recently undergone a thorough examination in the house of lords, and it is pointed out that the principle upon which most of the cases is based * * is now quite inapplicable, inasmuch as it has been the practice of the legislature for many years past to exempt the private means of such commissioners from liability, either by incorporating them

Mearns's Administrator v. Holbrook and Roosevelt

or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The rule, therefore, as now fixed by the highest English authority, is that commissioners or trustees sued in their corporate character, and not affected personally by the result of the action, are liable in that character to one who suffers from the wrongful acts or omissions of their servants, agents, or employees. In other words, they are not, properly speaking, public officers, and the rule that holds public officers not answerable for the acts of inferior servants has no application to the case of trustees incorporated for the public benefit." S. & R. on Negligence, and cases cited in the note.

In *Ruck v. Williams* (3 Hurls. & Nor. 308), which was a case against commissioners for damages sustained by reason of their own negligence in the discharge of their official duties, POLLOCK, C. B., said: "I see nothing in the character of the commissioners as a public body, or in the fact that they are discharging a public duty without any remuneration, to exempt them from liability to compensate a person who has suffered by their carelessness or want of due regard in the performance of their duty. They are entitled to reimburse themselves out of the funds over which they have control, and it would be hard indeed to throw on the plaintiff the loss which has been sustained, rather than let it be paid out of the common fund which the commissioners have at their disposal."

Where a personal liability is not sought against receivers, they can occupy no more favorable position, as public officers, than that of commissioners, and, where the duties imposed upon them are like those in this case, they clearly come within the reason of the rule applied to commissioners in the English cases.

The liability of receivers, subject to the control of the court appointing them, has also been recognized in this country. In *Blumenthal v. Brainard*, 38 Vt. 402, it was held to be no defense to an action at law, for a breach of duty or obligation arising out of the business entrusted to them in that relation, that the defendants were running and managing a line of railroad as receivers under an appointment of a court of chancery. In *Paige v. Smith*, 99 Mass. 395, it was held, that receivers running a railroad under appointment of a court of chancery in another State, who act as common carriers and are there held liable as such to actions at law, may be sued as common carriers in Massachusetts.

It would seem, then, that the official character of the receivers, when sued by leave of the court, will not protect them from liability for injuries arising out of the prosecution of their business.

Nor do we think the receivers can be exempted from liability, as claimed in argument, on the ground that they are agents or trustees; for, as to the public and their employes, they do not stand in either of these capacities. As to them the receivers had "no tangible principal behind them." They were the governing power in operating the road by virtue of the authority conferred upon them as receivers. From the time of their appointment, they had supreme control in relation to the running of the cars on the road. They alone had authority to employ, direct, control and dismiss the various agents employed by them to operate the road. They hired Meara as a laborer to work for *them* in the discharge of their duties as receivers. He was *their* servant, and they could direct his services or dismiss him at their pleasure. Neither the railroad company, nor any one else, after the receivers took possession of the road, could employ, direct, control or dismiss any of the employes of the receivers. Since, then, their agents had no other principal, and their servants no other master, the receivers stood in these respective relations to them. The employes of the receivers were their servants in the same unqualified sense that they would have been the servants of the railroad company if it had continued to operate the road, and had employed them in the same business. The receivers cannot, then, be exempted from liability for injuries sustained by their employes or others from the negligent discharge of their duties, on the ground that they may be, in some sense, the agents or trustees of other parties not directly answerable for the injury. *Bullou v. Farnum*, 9 Allen, 47; *Fenton v. Dublin Steam Packet Co.*, 8 Ad. & El. 835; *Quarman v. Burnett*, 6 M. & W. 509; *Dalzell v. Taylor*, 1 El. & Bl. 906.

The action was brought by the administrator of Martin Meara, under the statute entitled "An act requiring compensation for causing death by wrongful act, neglect or default." S. & C. 1139. It is the plain intent of the act to give the administrator of a deceased person, whose death has been "caused by wrongful act, neglect or default," a right of action on the same grounds that an action could have been maintained by the party injured if death had not ensued. The case, therefore, rests upon the same principle as though Meara,

Meara's Administrator v. Holbrook and Roosevelt.

If death had not ensued, had brought an action against the same parties, and based on the same grounds.

In the original and first amended petition, the receivers are the only parties defendant. Other defendants are introduced in the second amended petition, but without materially affecting the question as to the liability of the receivers for the tort alleged against them.

Although the allegations in the petitions are not full and definite, in relation to the appointment of the receivers and the extent of the duties imposed upon them under the order of the court, in the absence of any motion to make them more specific and definite, we think they may be regarded, in this respect, as sufficient in substance; for it is averred in each of the petitions that it was filed against the defendants as receivers, by leave of the court, and that as such receivers they were, at the time of the injury complained of, possessed of the use, occupancy and control of the property of the railroad company, including the cars running on the road, alleged, in the original petition, to be under the exclusive control of the defendants; and in the second amended petition it is averred that the road was, at the time the order of the court, in the control and management of the defendants, Holbrook and Roosevelt, as the legally constituted receivers of the road.

The demurrers admit the truth of the allegations contained in the petitions. It is averred in each of them that Meara was employed by the receivers as a *laborer* on the railroad. It is, therefore, not questioned but that his position as such was subordinate to the managing agents and superintendents of the receivers.

It is averred in each of the petitions that the death of Meara was caused while engaged in the business of the receivers, without any fault of his own. In the original petition it is alleged to have been caused by the negligence of the agents and superintendents of the receivers; and, in both the amended petitions, by the negligence of the receivers themselves.

The questions are therefore presented, whether a receiver operating a railroad is answerable in his official capacity for an injury to his servant, sustained, while in his employment, by reason of the negligence of the receiver, or the negligence of his agents in a position superior to that of the servant.

On the strength of the authorities already cited, as well as the reason and justice of the case, we think the question of his liability,

Mears's Administrator v. Holbrook and Roosevelt

in an action against him as receiver, should be determined by the same rules and principles that are applicable to persons or corporations engaged in the business of operating a railroad.

In *Sprague v. Smith*, 29 Vt. 421, which was a case against the trustees of the bondholders of a railroad, REDFIELD, C. J., said: "It is well settled in practice, and by repeated decisions, that the lessees of railroads are liable, to the same extent as the lessors would have been, while they continue to operate the road. * * * And we can see no reason why the defendants are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees, or any others exercising the franchise of the company for the time, must be; that is, they are the ostensible parties who appear to the public to be exercising the franchise of the company. It would be perplexing in the extreme to require strangers, suffering injury through the negligence of operatives under the defendants' control, to look beyond the party exercising such control. The party having this independent control is in general liable for the acts of those under such control, whether of contract or tort." The same principle, we have seen in *Blumenthal v. Brainard*, was, in the same State, applied to the receivers of a railroad, in a suit brought against them personally.

Where an action can be brought against a receiver in his official character, as in this State, there is no reason why he should not be held amenable, in that capacity, to the same rule. Indeed, the reasons for holding him answerable in his official capacity are stronger than those for holding him personally liable only. For, where the receiver is not in default himself, there is a hardship in making him personally liable for the negligences of those he employs, not for his own benefit or profit, but for that of the fund he controls; and, on the other hand, those having grievances growing out of his official business may be often practically remediless, if they are left to the personal responsibility of the receiver only, and are not permitted to pursue him in his official capacity, and obtain redress from the fund in his hands as receiver.

Nor would a recovery against him, and satisfaction out of the fund properly applicable to that purpose, work a greater hardship to the creditors and stockholders of the company, than that always sustained by them where the company itself is made liable for like grievances when it operates its own road. On the contrary, if the receiver be not held officially chargeable, in many instances they

Meara's Administrator v. Holbrook and Rosevelt.

might gain an advantage, by his operating the road, over what they would have if the company conducted its own business subject to its incidental losses.

Nor does it follow, if the receiver be held answerable as the company would have been if it had operated the road, that he would be relieved from accountability to his *cestui que trusts* for losses they might sustain through his personal misconduct or negligence.

In every view, therefore, it accords with sound principle and reason that a receiver, exercising the franchises of a railroad company, should be held amenable in his official capacity to the same rules of liability that are applicable to the company while it exercises the same powers of operating the road.

In determining the case before us, then, it only remains for us to apply the ordinary principles controlling cases of this class. Where a subordinate servant is injured, without his own fault, while engaged in the business of his employment, by reason of the negligence of his master or his agents, the master is liable to him in damages. *Fifield v. Northern R. R. Co.*, 42 N. H. 225; *Brydon v. Stewart*, 2 Macq. H. L. 30; *Railroad v. Keary*, 3 Ohio St. 201.

Meara was the servant of the receivers, and was injured, according to the cases made in the several petitions demurred to, either through the negligence of the receivers, or that of their agents in a position superior to that of Meara. The receivers are, therefore, liable.

It follows that the court of common pleas erred in sustaining the demurrers of the receivers to each of the petitions, and that the judgment in their favor must, therefore, be reversed.

As to the demurrer of the railroad company to the second amended petition, to which it was made party, it is sufficient to say that the remedy afforded by the statute on which the action is founded is limited to two years, which period had elapsed when that petition was filed and the company thereby first sued; an action for damages against the company was then barred. Regarded as a petition for equitable relief, no judgment having been obtained in favor of the plaintiff, the averments are not sufficient to make a proper case to hold the company to answer. This demurrer must, therefore, be sustained, and the judgment in favor of the company be affirmed.

BRINKERHOFF, C. J., SCOTT and WHITE JJ., concurred.

WELCH, J., dissented.

 Home Life Insurance Co. v. Dunn.

HOME LIFE INSURANCE CO., plaintiffs in error, v. DUNN, Admrx.

(20 Ohio St. 175.)

Removal of cause from State to United States Court.

The right to remove a cause from the State to the United States court, under the act of congress of March 2, 1867, is terminated by a hearing or trial upon the merits in a court of competent jurisdiction, resulting in a final judgment or decree; and an appeal or second trial does not revive the right.

APPEAL from an order of the district court reversing an order of the court of common pleas, removing a cause in which Lucinda M. Dunn, administratrix of John C. Dunn, was plaintiff, and The Home Life Insurance Company, a non-resident company, was defendant, to the United States circuit court. It appeared that Mrs. Dunn sued the insurance company on a policy of life insurance in the court of common pleas; the cause was tried before a jury and a verdict was rendered in favor of the plaintiff; that the company obtained a new trial, and subsequently obtained an order from the court, removing the cause to the United States circuit court by virtue of the act of congress of March 2, 1867. This order was reversed in the district court. The other important facts are stated in the opinion.

Hoadly, Jackson & Johnson, with *McGuffy, Monill & Strunk*, for plaintiff in error, cited *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 14 How. 23; *Same v. Same*, 15 id. 198; *Stevens & Dwight v. Phoenix Ins. Co.*, 41 N. Y. 149; *Justices v. Murray*, 9 Wallace, 274.

Standish & Brown, for defendant in error, cited 6 Ohio St. 143; *Herf & Co. v. Shultz et al.*, 10 Ohio 289; *Hadley v. Dunlap*, 10 Ohio St., 1; *Ackley v. Vilas*, 24 Wis. 165; see *Bowen & Seymour v. Joy*, 9 Johns. 219; *Welch v. Dirken*, 12 id. 99; *Hate v. Holly*, 3 Wend. 263; *Salmon v. Walton*, 9 Dana, 422; *Coll v. Partridge*, 7 Metc. (Mass.) 570; *Haup v. Granger*, 1 Conn. 154; *Ralph v. Brown*, 3 Watts. & Serg. 399.

WHITE, J. The order of the court of common pleas, removing the cause from that court, was a final order which the district court was authorized to review on error. Code, §§ 512, 513; S. & C

Home Life Insurance Co. v. Dunn.

Stat. 1099. The order determined the action in that court and prevented a judgment, and, if erroneous, affected the plaintiff's substantial rights.

Nor was the right of the plaintiff, to have the order reviewed on petition in error, impaired by the action of the defendant below in filing the transcript of the proceedings in the circuit court, nor by the fact that the motion of the plaintiff to dismiss the cause for want of jurisdiction in that court had been overruled.

The question before the district court on the petition in error was precisely the same as that raised by the petition of the defendant below for decision in the court of common pleas, viz., whether the removal of the cause from the State court to the circuit court was authorized by law. The jurisdiction of the district court was not dependent upon the way the question had been decided in the court below. The authority of the district court was to revise the action of the subordinate court, and, as such action was found to be in accordance with or against law, to affirm or reverse it.

The main question in the case is, whether the removal of the cause from the court of common pleas to the circuit court was authorized under the act of congress of March 2, 1867.

The act provides that, in the cases specified, the party entitled to the removal may file his petition therefor in the State court "at any time *before the final hearing or trial* of the suit," and, on his compliance with the terms prescribed, it is made the duty of the State court to accept the security offered, and to proceed no further in the suit. 14 U. S. Stat. at Large, 559.

This act is an amendment of the act of July 27, 1866, in which the language used is, that the petition may be filed "at any time *before the trial or final hearing* of the cause." 14 U. S. Stat. at Large, 307.

We have no doubt the terms "trial" and "final hearing" ought to have the same meaning in both acts, and that their transposition in the amendatory act was merely accidental.

The ground of the reversal of the order of the court of common pleas was, that the petition of the defendant below for the removal of the cause was not filed until *after* "the final hearing or trial," and that the case, therefore, did not come within the act of congress. The correctness of the decision turns on the meaning of these terms as used in the act.

The terms, it seems to us, were intended to embrace actions at

law and suits in equity, the word "trial" having reference to an action at law, and the words "final hearing" to a suit in equity, and that by "the final hearing or trial of the suit" is meant a hearing or trial upon the merits, such as results in a final judgment in an action at law, and a final decree in a suit in equity.

The act of congress was, doubtless, intended to have the same operation in all the States, irrespective of the difference that may exist in the modes provided in the several States for examining, in the appellate court, questions decided in the court below.

In this State, after final decree, equity cases are appealable to the district court, on the appellant giving notice and entering into an undertaking as required by the statute. In cases in which either party has the right to a trial by jury there can be no appeal; but either party, after final judgment, by giving notice of his demand, and entering into an undertaking as required by the statute, is entitled to a second trial. If no undertaking is given, the demand for a second trial and the notice of appeal go for nothing, and the judgment or decree is conclusive upon the rights of the parties. Such, also, is the effect of the judgment or decree from the time of its rendition to the giving of the undertaking; and notwithstanding the appeal or the right to a second trial may be perfected, the lien of the judgment or decree is continued until the determination of the cause on appeal or second trial.

It is competent for the legislature to take away the right of appeal and of a second trial. If this were done, there would be no ground for the removal of the cause under the act of congress.

The true construction of the act does not, we think, thus make its operation depend upon whether the legislation of the State allows or does not allow the exercise of appellate jurisdiction after a common-law trial, or the final hearing of a suit in equity in the court of original jurisdiction.

To bring this case within the act of congress would be to allow the non-resident party to experiment with the jurisdiction of the State courts. If the trial should result in his favor, it would bind his adversary; but if it should result adversely to him, he could escape the effect of the litigation by removing the cause to another jurisdiction. To lead us to such a conclusion, "the intention ought to be expressed with irresistible clearness."

The conclusion at which we have arrived in this case is in accordance with the decision of the supreme court of Wisconsin, in

Bradford v. Andrews.

Ackerly v. Vilas, 21 Wis. 165 (1 Am. R. 166). The judgment of the court in that case was pronounced by PAINE, J., in an able opinion, to which we refer for a more elaborate discussion of the questions.

We are unanimous in the opinion that there was no error in the judgment reversing the order of the court of common pleas. The motion for leave to file a petition in error is, therefore, overruled.

BRINCKERHOFF, C. J., SCOTT, WELCH and DAY, JJ., concurred.

BRADFORD, plaintiff in error, v. ANDREWS *et al.*

(20 Ohio, St. 206.)

Will. Statute of limitations. Practice.

Where proceedings for the contest of a will are commenced within the statutory period of limitation, although only part of the persons interested are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired. The plaintiff in such a case cannot, by dismissing his petition, put an end to the proceeding, where either of the defendants filed a cross-petition before the period of limitation had expired, or the original petition was dismissed.

ACTION to contest the validity of the last will of John Bradford. The petition was filed by Joseph A. Andrews within two years after probate of the will. William Bradford, one of the defendants, filed a cross-petition, also praying to have the will set aside. After the expiration of the two years, the statutory period of limitation, the plaintiff dismissed his petition, and a motion was made to dismiss the whole case by one of the defendants, on the ground that the dismissal of the original petition put an end to the action. This motion was overruled, and it was then discovered that Eliza Bradford and Sarah Watson, two persons interested in the contest, had not been made parties; whereupon, on motion of William Bradford, they were made defendants. Eliza Bradford and Sarah Watson appeared and set up the statutory limitation of two years as a bar to the action, as against them; this defense was held sufficient, and the court further held that the action was barred as to all the defendants, and ordered the dismissal of the whole case. William Bradford took a writ of error.

Bradford v. Andrews.

C. L. Vallandigham, for plaintiff in error, cited *Lockwood v. Wilkinson*, 13 Ohio, 430, 451; *Sheets v. Baldwin*, 12 id. 120, 131, 132; *Nusanis, Admr. v. Ran*, 18 id. 246; *Sturges v. Burton*, 6 Ohio St. 215; *Gray v. May*, 16 Ohio, 66; *Fisher's Exr. v. Mossman*, 11 Ohio St. 42, 46, approved 14 id. 411; *Haymaker v. Haymaker*, 4 id. 272; *Fbrd's Lessee v. Sangel*, 4 id. 464; *Wintermute v. Montgomery*, 11 id. 446, 448; *Furmin v. Anderson*, 53 E. C. L. R. 810; *Towns v. Mead*, 29 A. L. & E. 271; *Schooner Miranda v. Dowlin*, 4 Ohio St. 502; *Taylor v. Fitch*, 12 id. 169, 172, 173; *Barger v. Cochran*, 15 id. 461; *Moore et al. v. Armstrong*, 10 Ohio, 11; *Bronson v. Adams*, id. 135; *Meese & Wife v. Keefe*, id. 362; *Wilkins v. Phillips*, 3 Ohio, 49; *Massie's Heirs v. Matthews' Exr.*, 12 id. 351; *Kay et al. v. Watson*, 17 id. 27, 31, and others.

Youny & Gottschall and *Honk & McMahan*, for defendants in error, cited *Holt v. Lamb*, 17 Ohio St. 385-387; *Walker v. Walker*, 14 id. 157; *Thompson v. Thompson*, 13 id. 356; *Meares v. Meares*, 15 id. 94-98; *Meese & Wife v. Keefe*, 10 Ohio, 362; *Wilkins v. Philips*, 3 id. 49; *Massie v. Matthews*, 12 id. 351; *Sturges v. Longworth*, 1 Ohio St. 544; *Smetters v. Rainey et al.* 13 id. 568; 14 id. 287.

WELCH, J. We think the superior court erred in holding the action barred, and in dismissing the proceeding. Where a petition for such a contest is filed within the statutory period of limitation, although only part of the persons interested are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired. If any person interested appears, and in good faith files his petition for a contest, the statute entitles him to a trial, and the verdict of a jury, touching the validity of the will; and that verdict will be binding upon all parties who may be before the court, as such, at the time of its rendition. The interest of the parties is joint and inseparable. Substantially, this is a proceeding *in rem*, and the court cannot take jurisdiction of the subject-matter by fractions. The will is indivisible, and the verdict of the jury either establishes it as a whole, or wholly sets it aside. To save the right of action, therefore, to one, is necessary to save it to all. The case belongs to that class of actions where the law is compelled either to hold the rights

Bradford v. Andrews.

of all parties in interest to be saved, or all to be barred. And it seems not to be quite well settled law, that the preference will in such cases be given to the right of action, and not to the right of limitation. The right to sue is a favored right, and is guaranteed by constitutional provision, while the right of limitation generally meets with more or less disfavor. I am aware that the case of *Snetters and Harris v. Rainey and others* (14 Ohio St. 287), conflicts with this doctrine, and I am frank to say, for myself, that I deem that case a departure from well-established principles, and one that should be overruled whenever a proper case occurs for reconsidering the question involved. The question there, though really involving a like principle with that involved in the present case, was not identical, and need not, therefore, be passed upon by the court.

But, say the counsel for defendants in error, the plaintiff below dismissed his petition, after the expiration of the two years, and this put an end to the action, and left the matter standing as it would have stood had no petition ever been filed. When the jurisdiction of the court has once attached in such a case, I suppose it is not in the power of the petitioner to withdraw the action against the will of the other parties in interest. The status of the parties, as plaintiffs or defendants, is merely nominal. Those named as defendants have a right, equally with the nominal plaintiff, to insist upon a contest. Otherwise, there would be no safety to the defendants who happened to be identified in interest with the plaintiff, except in the commencement of separate similar actions, or the filing of a cross-petition by each. We need not, however, decide this question, for the precaution was taken in the present case to file such cross-petition before the period of limitation had expired or the original petition had been dismissed.

The court then disposes of a question of local practice.

We are of opinion that the superior court erred in dismissing the action, and, therefore, reverse its judgment, and remand the cause for further proceedings.

BRINKERHOFF, C. J., SCOTT, WHITE and DAY, JJ., concurred.

Judgment accordingly.

Dodge v. The National Exchange Bank.

DODGE, plaintiff in error, v. THE NATIONAL EXCHANGE BANK.

(30 Ohio St. 224.)

Bank—liability for payment of check on forged indorsement. Ratification.

Where a bill or check is payable to order, a banker has authority to pay to any person who becomes holder by a genuine indorsement; but the banker cannot charge his customer with payments made otherwise, unless (1) the circumstances amounted to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsement, or (2) were equivalent to a subsequent admission that the indorsement was genuine, in reliance on which the banker was induced to so alter his position as to preclude the customer from showing the indorsement to be forged.

Plaintiff being the owner of a certificate of indebtedness of the United States, indorsed it in blank and mailed it to a paymaster. It was stolen from the mail and presented to a paymaster by the thief, who represented himself to be plaintiff, and requested a check, saying that he could identify himself at the bank. The paymaster accordingly gave him a check, payable to plaintiff's order, on defendant bank. The bank paid the check to the bearer without inquiry on the forged indorsement of the plaintiff's name. The paymaster with notice of plaintiff's claim, subsequently lifted the check and was charged with its amount in his settlement with the bank. *Held* (1), that plaintiff's claim against the defendant bank was not affected by the paymaster's negligence in not requiring the person, to whom the check was given, to identify himself; (2) that plaintiff's claim was not affected by the subsequent settlement of the paymaster with the bank; and (3) that plaintiff could ratify the giving of the check in his name, thus making it his own, and maintain an action against the bank for the amount.

ACTION by Dodge against the National Exchange Bank of Columbus, Ohio, to recover the amount of a check drawn to plaintiff's order and paid by defendant bank on a forged indorsement, to one not entitled to it. The following is a copy of the check:

"No. 3609.

COLUMBUS, O., January 22d, 1866.

"The National Exchange Bank and Depository of the United States, Columbus, Ohio, pay to Frederick B. Dodge, or order, four hundred and eighty-six dollars and eleven cents.

"496.11.

WILLIAM S. STRYKER,

Paymaster U. S. Army."

The case was tried on the following agreed statement of facts:

Frederick B. Dodge, the plaintiff, resides at Toledo, Ohio. A few days prior to the 22d of January, 1866, being the owner of a certificate of indebtedness due to him from the United States for

Dodge v. The National Exchange Bank.

the sum of \$486.11, he indorsed the same in blank, and inclosed it in a letter which was sent by mail from Toledo to Cincinnati, O., to Dwight Bannister, paymaster U. S. A., then stationed at Cincinnati, requesting him to pay the same and return the money to him, by draft or check, by mail. This letter, with the certificate indorsed, was stolen from the mail or post-office at Cincinnati, and the certificate was presented for payment to said Bannister, at Cincinnati, by the thief, who falsely represented himself to be Frederick B. Dodge. The paymaster declined to pay the certificate to him without proof of identity, and the person holding it went out professedly to procure such proof, but did not return. On the 22d of January, 1866, the same person presented the said certificate for payment to W. S. Stryker, paymaster U. S. A., at his office in Columbus, O. The said paymaster received the said certificate, and, on requiring proof of identity, was told by the said person that he could identify himself at the bank. The said paymaster thereupon, in payment of said certificate, gave to him the said check on the defendant, a copy of which is set out in the petition. He presented the said check to the defendant on the same day, representing himself to be Frederick B. Dodge, the plaintiff, indorsed the said check in that name, and received the said money, to wit, \$486.11, from the defendant in payment of said check. The said plaintiff had no knowledge whatever of the said person; never gave him any authority to act for him, and the entire transaction was wholly without his knowledge or consent. The said defendant had no knowledge of the said plaintiff at the time of the payment of said check, nor of any of the foregoing facts that had transpired prior to the presentation of said check for payment, nor of the object or purpose of said Stryker in drawing said check payable to order. The said defendant, as a national bank and United States depository, had a running account with said Stryker, as paymaster, and paid the checks of said paymaster, given to soldiers from all parts of the State; and the same party presenting the check aforesaid claimed to be a soldier. The handwriting of plaintiff differed entirely from that of the person who received payment of the check. After the payment of said check by the defendant in manner aforesaid, and before this action was commenced, the said Stryker, with knowledge of the claim of the plaintiff, settled his account with the defendant and received and credited said check in said settlement.

Judgment below was for defendant. Plaintiff appealed.

Dodge v. The National Exchange Bank.

C. N. Olds, for plaintiff in error, as to the liability of a bank on a forged indorsement, cited *Vanbibber & Co. v. Bank of Louisiana*, 14 La. An. 481; *Graves v. The American Exchange Bank*, 17 N. Y. 205; *Mead v. Young*, 4 Tenn. 28; 2 Pars. on Bills, 64, 81, 584, 595, 596; Chitty on Bills, 64, 261; 1 Duer, 434; Story on Notes and Bills, p. 480, § 375, p. 483, § 379 and p. 492, § 385; 1 Hill, 287; 2 Sandf. 247; *Shaffer v. McKee*, 19 Ohio St. 526; 1 Pars. on Bills, 277, 278.

As to plaintiff's right to satisfy claim and hold the check, and thereby to ratify the act of Stryker, counsel cited 1 Pars. on Bills, 253; 2 id. 256; *Howe v. Hartness et al.* 11 Ohio St. 456; *Graves v. American Exchange Bank*, 17 N. Y. 207; *Vanbibber & Co. v. Bank of Louisiana*, 14 La. An. 481.

Henry C. Noble, for defendant in error, cited, as to the liability of the bank, 2 Pars. on Bills, 61; Story on Agency, § 308 *et seq.*; *Henshaw v. Noble*, 7 Ohio St. 226, 231; *Cogill v. American Exchange Bank*, 1 N. Y. 113; as to the right of action of plaintiff, counsel cited *Morgan v. The Merchants' Exchange Bank*, 1 Duer, 434; S. C. in appeal, 11 N. Y. 404; 1 Pars. on Prom. Notes, 48; *Clark v. Boyd*, 2 Ohio, 56; as to the right of the drawer of the check, *Smith v. The Merchants' Bank of New Orleans*, 6 La. An. 610; Story on Agency, §§ 246, 247.

WHITE, J. This case is not free from difficulty, and its determination has engaged the most attentive consideration of the court. We do not propose, however, to enter into a detailed examination of the authorities cited and relied upon by the counsel of the respective parties; but shall content ourselves mainly with stating the grounds upon which our conclusion is founded.

1. The undertaking of a banker to his customers, is to pay their bills or checks according to the law-merchant. If the bill or check is payable to order, it is an authority to pay to any person who becomes holder, by a genuine indorsement.

If the paper is originally payable to bearer, or if there is afterward a genuine indorsement in blank, it is an authority to pay to the person who seems to be the holder. *Roberts v. Tucker*, 16 Q. B. 560 (71 Eng. C. L. 559).

In this case it was laid down that the banker cannot charge his customer with any other payments than those made in pursuance of that authority, unless (1) the circumstances amounted to a direction

Dodge v. The National Exchange Bank.

from the customer to the banker to pay the paper without reference to the genuineness of the indorsement; or (2) were equivalent to a subsequent admission that the indorsement was genuine, in reliance on which the banker was induced to so alter his position as to preclude the customer from showing the indorsement to be forged.

Applications of the general rule are found in the following cases:

In *Graves v. The American Exchange Bank* (17 N. Y. 205), it was held that the drawee of a bill of exchange is bound to ascertain that the person to whom he makes payment is the genuine payee, or is authorized by him to receive it. And that it is no defense against such payee that the drawee, in the regular course of business, and with nothing to excite suspicion, paid the bill to a holder in good faith and for value, under the indorsement of a person bearing the same name as the payee.

Morgan v. The Bank of the State of New York (1 Kern. 404), was a suit against the bank for money deposited with it by the plaintiff. The defendant produced a check upon the bank which it had paid, for the amount of the money, signed by the plaintiff and payable to the order of Corless & Co., and with the name of this firm written upon it; it was proved that this was not the indorsement of the firm, and that it never owned or had any interest in the check. The court held the payment of the check to be no defense.

In *Vanbibber v. The Bank of Louisiana* (14 La. An. 481), it was held that the bank is liable to the payee of a check made payable to his order, when the check is paid on a forged indorsement made by the collector of the payee, who received the check in payment of a bill of merchandise entrusted to him for collection by his employer.

In the opinion in this case the court say: "The bank holds the money of its depositors, subject to be checked for, as their agent. When, then, the bank receives a check instructing them to pay a certain part of the deposit of the drawer to a third party, and the bank agrees so to do by its general custom, and by undertaking to pay it upon the supposed indorsement of the third party, the amount of the money represented by the check, and on deposit as that of the drawer, because *eo instante* the property of the payee, and the bank, from the moment it undertakes to pay the check, holds the amount of the check as the agent

Dodge v. The National Exchange Bank.

of the payee, and is responsible to the payee, as his agent, if it pays it upon a forged indorsement."

In *Tulbot v. Bank of Rochester* (1 Hill, 295), the principle was decided that the owner of negotiable paper had his election to sue the party taking and collecting it under a forged indorsement, either in trover for its conversion, or to recover its amount in an action for money had and received. See, also, *Shaffer v. McKee*, 19 Ohio St. 526.

2. Do the facts of this case bring it within either of the exceptions, before stated, to the general rule as to the liability of the bank to its customer, the drawer?

As to the first exception named, it seems to us they do not. We find nothing in the agreed statement amounting to a direction from Stryker, the drawer, to the bank, to pay the check without reference to the genuineness of the indorsement. On the contrary, the circumstances negative the idea of the existence of any such direction or authority. Striker, the paymaster, on receiving the voucher, required the person presenting it to identify himself as Frederick B. Dodge. This the person said he could do at the bank; and, thereupon, the check was given to him payable to the order of Frederick B. Dodge, with the understanding and expectation that it would be paid only in case he identified himself as the payee, or procured the indorsement of the latter.

If the person in presenting the voucher had been in fact authorized by Dodge, or had assumed to be his mere agent instead of assuming to be Dodge himself, the check might properly have been given in the way it was. In such case, if the bank had paid the check on the forged indorsement, we do not understand it to be claimed that such payment would have discharged the bank from liability. Yet, the facts known to the bank, and on which it acted in making the payment in the present case, do not differ from what they would have been in the case supposed. From the agreed statement it appears that the bank paid the check on the representation of the bearer that he was the payee, and on his indorsing it with the payee's name, without exercising any other precaution or making any further inquiry.

The ground on which the bank is claimed to be discharged from liability is the alleged negligence of Stryker in not requiring the person to whom the check was given to identify himself as Frederick B. Dodge, the owner of the voucher. It is not claimed that

Dodge v. The National Exchange Bank.

any fraud was intended, or that the drawer, in the manner of giving the check, violated any arrangement or understanding between himself and the bank.

On this branch of the case we are not unanimous. But it seems to a majority of the court that as it was competent for the drawer to make his check payable to the order of Dodge and devolve the duty on the bank of paying only on Dodge's genuine order, the liability of the bank cannot be affected or discharged by any act or omission of the drawer in issuing the check, of which the bank had no notice, and which in no way influenced its conduct. This principle is distinctly recognized in *Roberts v. Tucker, supra*.

In regard to the application of the second exception, above stated, to this case, viz.: the evidence of the subsequent implied admission of Stryker that the check had been paid to the proper party, arising from his taking up the check on settlement with the bank, it is sufficient to say, that whatever might be the effect in a controversy between the bank and Stryker, it cannot impair the rights which the plaintiff was then known to assert against the bank.

It appears, by the agreed statement, that Stryker settled with the bank with knowledge of the "claim of the plaintiff." We understand "the claim of the plaintiff" to refer to his claim against the bank, and which he, shortly afterward, brought his suit in the court below to enforce. The bank had charged the check against the drawer, and, on the settlement, received credit for the amount as so much of his deposit appropriated to its payment.

3. The remaining question is whether the plaintiff could ratify the giving of the check in his name, and thus make it his own.

We think he could, as well against the bank as against Stryker, and that by the agreed statement he is shown to have done so. It is a maxim that a subsequent ratification has a retrospective effect, and is equivalent to a prior command. An instance of the application of the maxim is, "that if the goods of A. are wrongfully taken and sold, the owner may bring trover against the wrong-doer, or may elect to consider him as his agent—may adopt the sale and maintain an action for the price." *Broom's Maxims*, *p. 834. So in this case, though the possession of the voucher by the person presenting it to the paymaster was tortious, the plaintiff could adopt his surrender and the receipt of the check in exchange, as the act of his agent.

The thief, if such he was, had no right to the check, either as

Dodge v. The National Exchange Bank.

against the plaintiff or the paymaster. As against him the plaintiff could ratify the exchange of the voucher for the check and claim the check; and such ratification would be good against the paymaster while he retained the voucher. As against the plaintiff the paymaster could not claim both check and voucher.

The effect of the ratification was to make the check the property of the plaintiff; but he did not thereby impliedly authorize the indorsement of the check. An agency to receive a check payable to order, implies no authority to indorse it in the name of the principal.

The transaction with the paymaster is distinct from that with the bank. The ratification of the former excludes the idea of a ratification of the payment by the bank. The check was made payable to the order of the plaintiff for his protection and benefit; the bank paid it in its own wrong without authority from him or the drawer.

But it is said that if a ratification be allowed, as between the plaintiff and the paymaster, it ought not to affect the bank, a third party.

The answer to this is, that the bank dealt with the transaction as it was finally ratified, and did nothing on the idea of its being unauthorized.

In the opinion of a majority of the court the judgment of the district court and of the court of common pleas must be reversed, and the cause remanded for a new trial.

Judgment reversed.

BRINKERHOFF, C. J., SCOTT and DAY, JJ., concurred.

WELCH, J., dissented.

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

FIRST NATIONAL BANK OF GREENFIELD, plaintiff in error, v. MARIETTA AND CINCINNATI RAILROAD COMPANY.

(30 Ohio St. 259.)

Common carrier—liability for money carried on person of passenger.

A common carrier of passengers is not liable for the negligent destruction of money kept in the custody of the passenger and carried by him, without notice to the carrier, for a purpose unconnected with the expenses of the journey.

Where plaintiff intrusted a package of money to his agent to carry, and the agent while a passenger on a railroad was killed, and the money which was carried on the agent's person, without notice to the railroad company, was destroyed by the company's negligence, it was held that the company was not liable for the loss of the money either on the ground of its duty as common carrier, or by virtue of the maxim *sic utere tuo, ut alienum non laedas*.

ACTION to recover the amount of money alleged to be negligently destroyed by defendant railroad company. The petition set forth briefly that on the 14th of February, 1865, the plaintiff bank intrusted to their agent, T. S. McElroy, the sum of \$4,000, in legal tender notes, to be transmitted from Greenfield to Cincinnati; that said agent took passage on defendant railroad at Greenfield for Cincinnati, with the money in his possession and on his person, and that the train on account of defendant's negligence fell through a bridge over Lee's creek, and the car in which said agent was taking fire, his body was consumed and the money with it. The petition was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment rendered for defendant. Plaintiff filed a petition in error.

S. & S. R. Matthews (with *Mills Gardner*), for plaintiff in error, as to the right of plaintiff to maintain the action cited, *N. Y. Steam Nav. Co. v. Merchant's Bank of Boston*, 6 How. 344; *Puterbaugh v. Reesor*, 9 Ohio St. 488; *Berkshire Woolen Co. v. Proctor*, 9 Cush. 424, *Beal v. Morris*, Yelverton, 182, and notes and cases cited in the American edition; *S. C. Cro. Jac.* 224; *Bac. Abr.*, Inns and Innkeepers, C. 5; *Tolsonson v. Havre de Grace Bank*, 6 Har. & Johns. 47, 53; *Bennett v. Miller*, 5 T. R. 273; *Mason v. Thompson*, 9

 First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

Pick. 280; *Epps v. Hinds*, 27 Miss. 657; *Needles v. Howard*, 1 E. D. Smith, 54; *Mears v. London & Southwestern Railway Co.*, 11 Com. Bench (N. S.), 850; *Tancred v. Allgood*, 4 H. & N. 438, and *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502.

Counsel argued the following propositions on the main question.

1. That the plaintiff's property being, at the time of its destruction, where it might have been and was lawfully; that is, in the exercise by the plaintiff of a legal right in reference to it, and being, without any fault of the plaintiff, destroyed by the negligence of the defendant, in the management of its own property, a right of action accrues for the damage, by virtue of the maxim, *sic utere tuo, ut alienum non lædas*.

2. That the duty which the defendant, as a common carrier of passengers, owed to McElroy, to exercise care and skill in transporting him safely, extends to all articles of value which at the time he had lawfully in his possession or about his person, so as to entitle him, or its owner, in case of injury resulting from a breach of that duty, to recover compensation for the damage done to such property; and cited, as to the first proposition, *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 175; *C. C. & C. R. R. Co. v. Keary*, 3 Ohio St. 205; *Dayton v. Pease*, 4 Ohio St. 96. See, also, Broom's Commentaries on the Common Law, 658, 661; *Langridge v. Levy*, 2 Mees. & Wels. 519; *Winterbottom v. Wright*, 10 id. 109; *Gerhard v. Bates*, 2 Ellis & Black. 476; *Longmeid v. Holliday*, 6 Exch. 761; *Dixon v. Bell*, 5 M. & Selw. 198; *Blackmore v. Bristol & Exeter Railway Co.*, 8 Ellis & Black. 1035; *Mars v. L. & S. W. Railway Co.*, 11 Com. Bench (N. S.), 854; *Farrant v. Barnes*, 11 Com. Bench, 553; *Brass v. Maitland*, 6 Ellis & Black. 470; *Williams v. East India Co.*, 3 East, 192; *Thomas v. Winchester*, 10 N. Y. 397; *Indermauer v. Dames*, L. R. 1 Com. Pleas, 274; *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223; *Chapman v. Rothwell*, E. B. & E. 168; *Southcote v. Stanley*, 1 H. & N. 247; *Barnes v. Wurd*, 9 Manning, Granger & Scott, 393; *Hadley v. Taylor*, L. R., 1 Com. Pleas, 53; *Vaughan v. Menlove*, 3 Bing. (N. C.) 468; *Vaughan v. Taff Vale Railway Co.*, 3 H. & N. 743; 5 id. 679; *Piggott v. Eastern Counties Railway Co.*, 3 C. B. 229; *Aldridge v. Gt. West. Rail. Co.*, 3 M. & Gr. 515; *Fremantle v. Lond. & N. West. Rail. Co.*, 10 C. B. (N. S.) 89; *Dulyell v. Tyer, Ellis, Blackburn & Ellis*, Q. B. 899 (96 E. C. L.); *Phila. & Read. R. R. Co. v. Derby*, 14 How. 485.

As to the second proposition, counsel cited *Le Conteur v. London*

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

and Southwestern Railway Co., Law Rep., 1 Q. B. 54. See, also, *Marshall v. York, Newcastle and Berwick Railway Co.*, 11 Com. Bench, 655; *Davidson v. Graham*, 2 Ohio St. 13; *Graham & Co. v. Davis*, 4 id. 362; *Wilsons v. Hamilton*, id. 722.

And the want of notice, as to the presence of such property, fails as a ground of defense: See *Jordan v. Fall River Railroad Co.*, 5 Cush. 74; *Brooke v. Pickwick*, 4 Bing. 218; *Batson v. Donovan*, 4 B. & Ald. 21; *Johnson v. Stone*, 11 Humph. 419; 21 Ill. 278; *Smith and Wife v. The Boston and Maine Railroad Co.*, 44 N. H. 235; *Riley v. Horne*, 5 Bing. 217; *Sleat v. Fagg*, 5 B. & Ald. 342; *Butcher v. The London and Southwestern Railway Co.*, 16 Com. Bench, 13; *Dansay v. Richardson*, 3 El. & Bl. 170; *Great Northern Railway v. Shepherd*, 8 Exch. 30; *Richards v. London, Brighton and South Coast Railway Co.*, 7 Com. Bench, 839; *Walker v. Jackson*, 10 Mees. & Wels. 161; *Hinton v. Dibdin*, 2 Ad. & El. (N. S.) 646; *Wilson v. Butt*, 11 Mees. & Wels. 113; *Wyld v. Pickford*, 8 id. 113; *Holder v. Souby*, 8 Com. Bench, 255; *Manning v. Wells*, 9 Humph. 748; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 424; *Kent v. Shuckard*, 2 B. & Ald. 803; *Wilkie v. Bolster*, 3 E. D. Smith (N. Y. Com. Pleas), 337; *Wilson v. Newport Dock Co.*, 12 Jurist, N. S., 233 (5 Am. Law Reg. 748); *Knight's Admr. v. Quarles*, 2 Brod. & Bing. 102; 1 Williams on Exrs. 712 (5th Am. ed.); Broom's Legal Maxims, 702; *Drake v. Beckham*, 11 M. & W. 319.

Counsel further argued that the damages were not too remote, and cited *Rigby v. Hewitt*, 5 Exch. 249; *Harrison v. Berkley*, 1 Strob. 525, 549; *Leame v. Bray*, 3 East, 599; *Weaver v. Ward*, Hob. 134; *Dickenson v. Watson*, 2 Jones, 205; *Costle v. Duryea*, 32 Barb. 480; *Dixon v. Bell*, 5 M. & S. 198; *Greenland v. Chaplain*, 5 Exch. 243; *Smeed v. Ford*, 1 El. & El. 602; *Gibbons v. Pepper*, 1 Lord Raymond, 38; *Vanderburgh v. Truox*, 4 Denio, 464; *Gerhard v. Bates*, 2 El. & El. 490; *Guille v. Swan*, 19 Johns. 381; *Powell v. Salisbury*, 2 Y. & Jer. 391; Sedg. on Dam. 86 *et seq.*; *Gunter v. Astor*, 3 Moore, 12; *Lumley v. Gye*, 2 El. & Bl. 236; *Wilson v. Newport Dry Dock Co.*, 12 Jurist, N. S. 233 (5 Am. Law Reg. 748); *Jones v. Boyce*, Stark. 495; *Davis v. Garrett*, 6 Bing. 716; *Scott v. Shepherd*, 2 W. Bla. 892.

Finally, *Jackson & Johnson* for defendant in error, argued that the company would not have been liable even if the money had been contained in the agent's trunk, for the term "baggage," or "lug-

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

gage," does not include money in large quantities, and cited *Jones v. Voorhees*, 10 Ohio, 150; *Mad River Railroad Company v. Fulton*, 20 id. 318; *Orange County Bank v. Brown*, 9 Wend. 85; *Hawkins v. Hoffman*, 6 Hill, 586; *Hickox v. Naugatuck Railroad Co.*, 31 Conn. 281; *Bell v. Drew*, 4 E. D. Smith, 59; *Duffy v. Thompson*, id. 178; *Doyle v. Kiser*, 6 Ind. 242; *Bomar v. Maxwell*, 9 Humph. 621; *Fowler v. Dorlon*, 24 Barb. 385; *Chicago & Aurora R. R. Co. v. Thompson*, 19 Ill. 578; *Davis v. Michigan, etc., R. R. Co.*, 22 Ill. 278; *Hutchings v. Western, etc., R. R. Co.*, 25 Ga. 61. The company had no notice of the money being carried. See *Pardee v. Drew*, 25 Wend. 459; *Farrant v. Barnes*, 11 Com. Bench, 553; S. C., 8 Jurist (N. S.), 868; *Marble v. City of Worcester*, 4 Gray, 395.

This money was unlawfully where it was, and no duty or obligation to protect it existed. The carrier might "not be justified in throwing it overboard," as Chief Justice JERVIS says, in 11 Com. Bench, 555, but he is not liable for negligence. See, also, *Allen v. Sewall*, 2 Wend. 327; *Sewall v. Allen*, 6 id. 335; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, 54; *Orange County Bank v. Brown*, 9 Wend. 116; *Tower v. Utica and Schenectady Railroad Co.*, 7 Hill, 47; *Richards v. Wescott et al.*, 2 Bosw. 589; *Chicago and Aurora Railroad Co. v. Thompson*, 19 Ill. 578, 594; *Davis v. Michigan Southern Railroad Co.*, 22 Ill. 278; *Hutchings & Co. v. Western and Atlantic Railroad Co.*, 25 Ga. 64; *Miles v. Cattle et al.*, 6 Bing. 473, most resembles the case at bar; *Gibbons v. Paynter et al.*, 4 Burr. 2298; *Great Northern Railway Co. v. Shepherd*, 8 Exch. 30; *Cahill v. London and N. W. Railway Co.*, 13 Com. Bench, N. S. (106 Eng. Com. Law) 818; *Belfast, etc., Railway Co. v. Keys*, 9 House of Lords Cases, 555; S. C., 8 Jurist (N. S.), 367; *Doyle v. Kiser*, 6 Ind. 245.

Counsel further argued that the fraud of plaintiff's agent contributed to the loss; when property is brought into danger purposely, as here, the fraud is intentional, and operates as a continuing and present purpose at the very moment of the injury. In most if not all the States, where the straying of cattle has been treated as negligent, it has been held to be a proximate, not remote cause. *Perkins v. Eastern and B. & M. Railroad Companies*, 29 Me. 307; *Tower v. Providence & Worcester Railroad Company*, 2 R. I. 404; *Tonawanda Railroad Company v. Munger*, 5 Denio, 255; *Munger v. Tonawanda Railroad Company*, 4 Comst. 349; *New*

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

York & Erie Railroad Company v. Skinner, 19 Penn. St. 298; *Williams v. Michigan Central Railroad Company*, 2 Mich. 259; *Chicago & Mississippi Railroad Company v. Patchin*, 16 Ill. 196; *G. W. Railroad Company v. Thompson*, 17 id. 131; *Central Military Tract Railroad Company v. Rockafellow*, id. 541; *Illinois Central Railroad Company v. Reedy*, id. 580. See, also, *Timmons v. Central Ohio Railroad Company*, 6 Ohio St. 109; *Trow v. Vermont Central Railroad Company*, 24 Vt. 487; *Chicago & N. W. Railway Company v. Goss*, 17 Wis. 428; *Perrin's Administrators v. Protection Insurance Company*, 11 Ohio, 147; *Waters v. The Merchants' Louisville Insurance Company*, 11 Pet. 519.

SCOTT, J. If the facts stated in the petition show the defendant to have been guilty of a breach of contract, or derelict in respect to a legal duty, we think the plaintiff's claim cannot be resisted on the ground that the contract was made, not with the plaintiff, but with an agent acting in his own name, or that the supposed duty was owing to the agent and not to his principal. The bank had the same right to send the notes in controversy by McElroy, as a special agent, as it would to have carried them over the same road under the same circumstances through its president, cashier or any other officer; and McElroy had the same right to carry the notes for the bank, as for himself, had they been his property. We fully concur with the supreme court of the United States in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*, 6 How. 344 (cited by counsel) where it is said: "The cases are numerous in which the general owner has sustained an action of tort against the wrong-doer for injuries to the property while in the hands of the bailee. The above cases (referring to cases previously cited) show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a view to avoid circuitry of action, saving, at the same time, to the defendant all the rights belonging to him if the suit had been in the name of the agent." We may add that our code of civil procedure requires actions generally to be prosecuted in the name of the real party in interest; and if the plaintiff's property was destroyed solely through the negligence of the defendant, and without fault on the part of the agent, it is clear that the estate of the latter cannot be held liable for the loss, and the liability, if there be

 First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

one, rests on the defendant. We think, then, that the case stands on the same grounds, and presents precisely the same questions, as though the notes had been the property of McElroy, and he, having survived, had brought this action to recover of the defendant for their loss. Could such action be maintained, under the state of facts shown by the petition?

In the able and elaborate argument of counsel for plaintiff, the right to recover is based upon two distinct grounds:

1. That the plaintiff's property being at the time of its destruction where it was lawfully—that is, in the exercise by the plaintiff of a legal right in reference to it—and being, without any fault of the plaintiff, destroyed by the negligence of the defendant, in the management of its own property, a right of action accrues for the damage, by virtue of the maxim, *sic utere tuo, ut alienum non ledas*.

2. That the duty which the defendant, as a common carrier of passengers, owed to McElroy, to exercise care and skill in transporting him safely, extends to all articles of value which, at the time, he had lawfully in his possession, or about his person, so as to entitle him, or its owner, in case of injury resulting from a breach of that duty, to recover compensation for the damage done to such property.

As to the first of these propositions, we do not call in question the justice or soundness of the maxim upon which it is supposed to rest. The only doubt is as to its proper application to the present case. Though stated as a distinct ground of the plaintiff's claim, I do not find it easy to consider, discuss, and apply to the case the first proposition, without any reference whatever to the second. For it will be observed that this first proposition is not based upon any contract between the parties, between McElroy and the defendant; nor does it at all rest upon any liability on the part of the defendant *as a common carrier of goods or of passengers*; it ignores the fact that McElroy, with the plaintiff's money about his person, was a *passenger* being carried on defendant's cars; and regarding McElroy and the plaintiff merely as portions of the general public, it seeks a recovery on the ground that the defendant negligently conducted its business in the running of its train of cars as to destroy the plaintiff's property. Yet it proceeds on the important assumption that the plaintiff's money was lawfully where it was, at the time when the catastrophe occurred; that is, that McElroy, as a passenger on defendant's train of cars, had a right to carry the

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

money with him, and, without notice to defendant, to subject it to such perils as might arise from the negligence of defendant's servants in the management of the train. Had the money not been in the defendant's car, it would not have been subjected to the peril which caused its destruction; and the question whether it was lawfully there, necessarily involves a consideration of the second proposition. Damage resulting from the negligence of another will not in all cases constitute a cause of action. Should A. through negligence burn his own house, and with it the property of B. placed therein without the knowledge or consent of A., we apprehend B. could not hold A. liable for the loss. We cannot, therefore, ignore the fact that the carrying of the money in defendant's car was an essential element in the circumstances occasioning the loss, nor the fact that it was so carried by a person whose only right to be there was in virtue of his character as a passenger. To ascertain the rights of McElroy as such passenger, and the obligations and liabilities of the defendant as a common carrier, in respect to the property destroyed, necessarily requires a consideration of the second proposition, which bases the right to a recovery on the relation subsisting between McElroy and the defendant, at the time of the loss, and the duties and obligations which that relation imposed on the defendant.

As we have said, the relation subsisting between McElroy and the defendant was that of passenger and common carrier, and it was in virtue of that relation that plaintiff's money was brought into defendant's car, and became exposed to the peril which caused its loss. What, then, was the contract between the defendant, as a common carrier of passengers, and McElroy, and what was the extent of the obligations imposed on the defendant by law, in virtue of that contract?

Upon well settled principles the defendant became bound, in consideration of the fare paid by McElroy, to use the highest degree of diligence and care in transporting him to his place of destination. And this contract for the carriage of his person necessarily included the wearing apparel which accompanied his person, such reasonable sum of money as might be in good faith carried with him for the expenses of the journey, together with all such articles, to a reasonable extent, at least, as are ordinarily carried or worn upon the person for purposes of personal use, convenience or ornament; and we agree with counsel for plaintiff that the contract also included the

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

carriage of "his baggage delivered to the defendant, as such, to be carried, to the extent of an ordinary and reasonable wardrobe for one in his station in life, together with such articles as are usually found in the paraphernalia of a traveler."

But the notes for the loss of which this action is brought can neither be regarded as a part of the passenger's baggage, nor as money intended to defray the expenses of the journey. The statements of the petition show that the notes were simply being transmitted, for business purposes, from Greenfield to Cincinnati, and were not intended to be used by the passenger for defraying the expenses of his journey or otherwise. The trip may have been undertaken on account of the money, but the money was not carried on account of the trip. Nor was the defendant intrusted with the custody of these notes, or specially charged with any care or oversight in respect to them. They remained in the exclusive custody and control of McElroy. And as they were clearly not included in the contract for the transportation of the passenger and his baggage, and were not subjected to the custody of the carrier, it is difficult to see how he can be held liable for a want of care over them.

We do not call in question the right of a passenger to carry about his person, for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating that fact to the carrier, or paying anything for their transportation. But he can only do so at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants, is concerned. For this secret method of transportation would be a fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of parcels never delivered to him for transportation, and of which he has no knowledge, and has therefore no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount would be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself.

Whether the defendant is engaged in the business of transporting valuable packages, does not appear from the petition; but, be that as it may, the transaction and contract of McElroy was with the defendant in its character of a carrier of passengers only. The defendant might well have declined all responsibility for the

First National Bank of Greenfield v. Marietta and Cincinnati Railroad Co.

negligence or dishonesty of its servants in respect to valuable parcels, by refusing to engage in their transportation, and if it was engaged in such business, it might well insist upon having exclusive custody of the parcels during transportation, and upon compensation for the trouble and risk incident to the business, as conditions of its liability.

It is claimed in argument that a common carrier of passengers has no reason to complain if he be held responsible for a loss of property resulting as a direct consequence from the want of that degree of care which the law requires him to exercise toward the persons of his passengers. But in the case of a breach of contract, the delinquent party can only be held liable for such damages as are so far the natural and direct result of the breach that they may reasonably be presumed to have been in the contemplation of the parties when the contract was entered into. Now, admitting the breach of contract with McElroy, the question is as to the extent of the liability incurred. It would seem from the petition that the defendant dealt with McElroy only as an ordinary passenger, seeking transportation for himself and ordinary baggage. He could not reasonably suppose that the defendant, by selling him a ticket and agreeing to carry him and his baggage with due care, contemplated incurring a liability in respect to a large sum of money, of which defendant had no knowledge, and which he was carrying solely for the purpose of transferring it from one point to another.

The case made by the petition is not one in which the plaintiff's property has been destroyed by an act of positive misfeasance in the nature of a forcible trespass. The defendant is not charged with its willful destruction, nor with such gross negligence as would approximate to wantonness. Both the petition and the argument of counsel proceed upon the theory that any negligence which would render a carrier of passengers liable for personal injury sustained by a passenger, will make him, at the same time, liable for all damages resulting therefrom to any property which the passenger may have lawfully with him or about his person at the time. The doctrine thus broadly stated is, we think, unsustained by authority, and cannot be maintained upon principle. In effect, it ignores the distinction between the property covered by the contract for transportation and that which is outside of it. In the very elaborate argument of counsel, many cases have been referred to which we do not think it necessary to review. It may be sufficient to say

Widoe v. Webb.

that they are all clearly and broadly distinguishable from the present case. No case has been found in which an action like the present has been held maintainable. Indeed, counsel frankly concede its *novelty*. While this objection may not be absolutely conclusive against the plaintiff, yet the fact furnishes strong evidence of the very general understanding of the legal profession on the subject.

We think the demurrer to the petition was properly sustained by the court below, and its judgment is therefore affirmed.

Judgment affirmed.

BRINKERHOFF, C. J., and WELCH, WHITE, and DAY, JJ., concurred.

WIDOE, plaintiff in error, v. WEBB.

(30 Ohio, 431.)

Promissory note—consideration of illegal in part.

A promissory note, the consideration of which is illegal in part, is wholly void. So held where a part of the consideration was the purchase-money of intoxicating liquors sold in violation of statute.

ACTION on a promissory note made by Webb, the defendant, and delivered to Widoe, the plaintiff. The defense was illegality of consideration. The opinion sufficiently states the facts. The judgment was for defendant, in the court of common pleas, which was affirmed by the district court. Plaintiff further appealed to this court.

A. K. Dunn, for plaintiff in error, argued :

1. That the purchase of each item of the account was a several contract. *Robinson v. Green*, 3 Meto. 159; *Mayor v. Pyne*, 3 Bing. 285; *Perkins v. Hart*, 11 Wheat. 237, 251; *Sickles v. Putterson*, 14 Wend. 257; *Robinson v. Snyder*, 25 Penn. St. 203; *Parsons on Cont.* 495.

2. If the different items composing the account constituted each a several contract, the plaintiff was entitled to recover to the extent of the valid consideration. *The State v. Findley*, 10 Ohio, 51; *Mor-*

Widos v. Webb.

rie v. Way, 16 id. 469; *Doty v. The Knox County Bank*, 16 Ohio St. 133; *Parish v. Stone*, 14 Pick. 198; *Robinson v. Green*, 3 Metc. 159; 2 Kent's Com. *467, *468; 1 Parsons on Cont. 457.

James Olds, for defendant in error, argued that the consideration of the note being made up in part for intoxicating liquors, sold in violation of law, the note is void. S. & C. 729, 1431; *Collins v. Merrill*, 2 Metc. (Ky.) 163; 3 Bibb. 500; 6 Dana, 91; 8 B. Monr. 98; 9 id. 90; *Deering v. Chapman*, 22 Me. 488; *Hunt v. Knickerbocker*, 5 Johns. 327; *Greenaugh v. Balch*, 7 Greenl. 462; *Wheeler v. Russel*, 1 Mass. 258; 5 B. & C. 406; *Kepner v. Kelfer*, 6 Watts, 231; *Wright v. Gear*, 1 Root, 474; *Mitchell v. Smith*, 4 Dall. 269; *Roby v. West*, 4 N. H. 287; 1 Taunt. 136; *Bliss v. Negus*, 8 Mass. 51; 5 N. H. 196; 6 id. 225; Cro. Eliz. 199; 3 Taunt. 226; 1 Term R. 227, 359; Comyn's Dig., Assumpsit, B. B.; 11 East, 502; 7 Term R. 206; 2 Ventr. 223; 8 Johns. 253; *Loomis v. Newhall*, 15 Pick. 167; Parsons on Cont.; Chitty on Cont. (5th Am. ed.) 417, 427, 692, 692, 694; Metc. on Cont. (Amer. Jurist, No. 43) 45; *Higgins v. Pitt*, 4 Exch. 324; *Trovinger v. McBurney*, 5 Cow. 253; *Baldwin v. Palmer*, 10 N. Y. 232; *Jones v. Waite*, 35 E. C. L. 130; *Woodruff v. Hinman*, 11 Vt. 592; *Gamble v. Grimes*, 2 Carter (Ind.), 392; 9 Vt. 23, 310; *Armstrong v. Toler*, 11 Wheat. 258; *Perkins v. Cummings*, 2 Gray, 258; *Adams v. Bowen*, 8 S. & M. 624; *Orr v. Lacey*, 2 Doug. (Mich.) 230; *Miller v. Harden*, 32 Ala. 30; *Stanley v. Nelson*, 28 id. 514; *Bates v. Watson*, 1 Sneed, 376; *Nutter v. Stoner*, 48 Me. 163.

SCOTT, C. J. The evidence in this case tended to show that the consideration of the note sued upon was an existing indebtedness of the defendant to the plaintiff on account for goods, etc., sold and delivered by the plaintiff to the defendant, the items of which had accrued at various times during the period of eighteen months preceding the date of the note. Some of these items were for necessary family groceries and some for spirituous liquors, sold to be drank at the place where sold, in violation of the statute. The court instructed the jury that if any of the items for spirituous liquors thus illegally sold entered into and formed part of the consideration of the note, then the plaintiff could not recover, the law being that when any part of the entire consideration of a promise is illegal the whole contract is void. And the question before us

is, did the court err in so instructing the jury as to the law applicable to the case?

The concurrent doctrine of the text-books on the law of contracts is, that if one of two considerations of a promise be *void* merely, the other will support the promise; but, that if one of two considerations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful, because the *whole consideration* is the basis of the *whole promise*. The parts are inseparable. Metc, on Contr. 246; Addison on Cont. 905; Chitty on Cont. 730; 1 Parsons on Cont. 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94. Whilst a partial *want* or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire, and cannot be apportioned; and it has been said, with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. Story on Prom. Notes, and Byles on Bills, *supra*. And, in general, it makes no difference, as to the effect, whether the illegality be at common law, or by statute. See authorities, *supra*.

This doctrine is abundantly sustained by the whole current of the decisions on the subject, both in England and in this country. *Featherstone v. Hutchinson*, Croke's El. 200; *Robinson v. Bland*, 2 Burr. 1077; *Scott v. Gilmore*, 3 Taunton, 228; *Thomas v. Williams*, 10 Barn. & Cres. 684; *Jones v. Waite*, 35 E. C. L. (5 Bing. N. C.) 341; *Armstrong v. Toler*, 11 Wheat. 258; *Bates v. Watson*, 1 Sneed, 376; *Orr v. Lacy*, 2 Douglas, 230; 9 Vt. 23; *Deering v. Chapman*, 22 Me., 488; *Carleton v. Woods*, 8 Foster (N. H.), 290; *Hinds v. Chamberlin*, 6 N. H. 225; *Hinman v. Woodruff*, 11 Vt. 592; *Perkins v. Cummings*, 2 Gray, 258; 8 Sm. & Marsh. 634; *Loomis v. Newhall*, 15 Pick. 159; *Crawford v. Morrell*, 8 Johns. 253.

Widoe v. Webb.

Quite a number of these cases cannot be distinguished from the case under consideration.

Robinson v. Bland was the case of a suit on a bill of exchange given in part for money lost at play, and in part for money lent. The declaration contained special counts on the bill, and the common count for money lent, and it was held no recovery could be had on the bill, because part of its consideration was money lost at play, which was illegal; but as to the money lent, the plaintiff was allowed to recover on the common count.

In *Scott v. Gilmore*, 3 Taunt. 228, the suit was also on a bill of exchange, given by the drawer to the keeper of a coffee-house, in payment for the balance of a debt, part of which was for small sums of money loaned, and part for spirits sold in violation of a statute, and it was held by MANSFIELD, Ch. J., that the security being entire could not be apportioned, and since it was given partly for a consideration not merely void, but illegal, the whole bill was void. HEATH, J., said: "Perhaps it might be different if for part of the bill there were no consideration."

The case of *Deering v. Chapman*, cited above, was a suit on a promissory note in which part of the consideration was, as here, for spirituous liquors previously sold in violation of a statute, and several of the other cases cited are of the same character. In each of them the whole note was held to be tainted and utterly void. In none of them does a distinction appear to have been taken between the case where the note was given at the time the illegal transaction took place, which entered into the consideration of the note, and was the immediate inducement to its execution, and the case where the note was subsequently given for the purpose of carrying out or securing the performance of the original illegal contract. On the contrary, they clearly proceed on the principle, that whenever the subject-matter of the contract can be traced back, between privies, to an original illegal contract, the substitute security is void. *Adams et al. v. Rowan et al.*, 8 Smedes & Marsh. 624.

The application of these principles to the present case compels us to say that the instruction given to the jury by the court, upon the trial, was correct, and the judgment was properly affirmed by the district court.

The suit was upon a promissory note alone—upon a single and entire promise. This note was given in settlement of an account embracing transactions between the parties for a period of eighteen

months. The evidence tended to show that whilst some of these transactions were proper and legal, yet many of the items of the account were for intoxicating liquors sold by the plaintiff to the defendant in direct violation of the provisions of a highly penal statute. The contract evidenced by the note was illegal and void, because these sales of liquors, which formed a part of its consideration, were clearly illegal.

With respect to the items of the plaintiff's account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note. For being utterly void it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: "It is but a reasonable punishment for including with his just due that which he had no right to take."

We are not unaware of a seeming conflict between the conclusion at which we have arrived, and the third point in the syllabus of the case of *Doty v. The Knox County Bank*, 16 Ohio St. 133. We are by no means satisfied that the judgment in that case was erroneous. The question there arose upon a petition to vacate a judgment which had been rendered at a previous term against Doty and in favor of the bank for upward of \$4,000, by confession on a warrant of attorney. The suit had been brought on a bill of exchange for \$4,000, and it appeared, upon the hearing of the petition for vacation, that a portion of a prior bill for \$1,800 entered into and formed part of the consideration of the bill upon which judgment had been entered; and that, in the previous discounting of the \$1,800 bill, some foreign bank bills of a less denomination than ten dollars had been paid out by the bank, contrary to the provisions of the statute upon that subject. The court below held that the bill for \$1,800, by reason of the premises, was wholly void, and the bank thereupon remitted upon its judgment so much of the \$1,800 as had entered into the consideration of the bill on which judgment had been entered. The residue of this bill was found to have a good and valid consideration, to wit, other and previous bills of exchange on

Camp v. Bostwick.

which Doty was justly indebted. The statute forbade the vacating of the judgment until it should be adjudged that there was a valid defense to the action; and the question was whether, after this remittitur, the judgment thus reduced should be wholly vacated, and the bank be required to bring its action on the valid bills, which had entered into the consideration of the bill in suit, and as to which there was no defense. The court refused to vacate the judgment *in toto*, and drive the parties into further litigation, which was required neither by considerations of justice, nor the provision of the statute, and would have left the parties where they then stood. It is not every defense, which might be available when set up by answer at the proper time, that will require a judgment to be vacated in order that it may be interposed. In the case referred to, the judgment of the court below was affirmed by this court. Whilst we think that judgment may well be upheld, yet as to the third point of that syllabus, which holds that, in so far as the prior illegal bill entered into the consideration of the renewed bill, the latter was merely rendered void *pro tanto* for want of consideration, a majority of the court, upon full consideration, think it cannot be reconciled with the current of the authorities, and that, in so far as it conflicts with the present decision, it is untenable.

WELCH, WHITE, and McILVAINE, JJ., concurred.

DAY, J., concurred in the judgment of affirmance, but not in the modification of the case of *Doty v. The Knox County Bank*.

The judgment of the district court is affirmed.

CAMP *et al.*, plaintiffs in error, v. BOSTWICK.

(20 Ohio St. 337.)

Contribution between co-sureties. Statute of limitations.

The estate of a deceased surety of a principal debtor was discharged from liability to the creditor, through his negligence, by operation of the statute of limitations. A co-surety afterward paid the debt. *Held*, that the estate was liable to contribute to such co-surety, notwithstanding it was released from direct liability to the creditor.

ACTION by Bostwick against Camp and wife, and others, as heirs of Abram Olmstead, to compel contribution as between co-sureties

Camp v. Bostwick.

It appears that on the 29th of April, 1856, Olmstead and plaintiff became sureties for Whittlesey to Giddings, in a joint and several promissory note for \$500, bearing ten per cent interest; that Olmstead died in December, 1858, and his estate was settled in December, 1859, without providing for the payment of the Giddings' claim; that Whittlesey died in March, 1861, insolvent, after having paid \$273.98 on the note, leaving the balance due and unpaid; that on the 8th of May, 1863, plaintiff paid his share of the balance, viz., \$300, and on the 19th of November, 1866, paid the further sum of \$394.63, in satisfaction of a judgment recovered against him individually, by Giddings, for the balance of the note. This action was brought December 29, 1866. The opinion contains the remaining facts of importance. Judgment below for plaintiff. Defendants filed their petition in error.

Hart & Reed, for plaintiff in error, argued that the claim of Giddings was barred as to the estate by the statute of limitations, and plaintiff, in paying it, did not pay a debt for which the estate was liable, and cited S. & C. 585, § 101; id. 610-614, §§ 227, 248; *Admr. of Gilbert v. Admr. of Little*, 2 Ohio St. 156; *Brown et al. v. Anderson, Admr.*, 13 Mass. 201; *Dawes, Judge, etc., v. Shedd et al.*, 15 id. 6; *Thompson v. Brown et al.*, 16 id. 172. The payment by Bostwick did not relieve the estate of any burden or confer any benefit. *Russell v. Failer*, 1 Ohio St. 327; *Skillen v. Merrill*, 16 Mass. 40; *Williamson's Admr. v. Rees' Admr. et al.*, 15 Ohio, 572; *Wheatfield Tp. v. Brush Valley Tp.*, 25 Penn. St. 112. The estate was not affected by the judgment against plaintiff. *Cox v. Hill et al.*, 3 Ohio, 409; *Thompson v. Young*, 2 id. 334. Plaintiff could have paid the whole debt before the statute of limitations had barred the Giddings' claim as to the estate, and then compelled the estate to make contribution. *Williams' Admr. v. Williams' Admr.*, 5 id. 444; *Skillen v. Merrill*, 16 Mass. 40; *Ide v. Churchill*, 14 Ohio St. 373. Plaintiff's delay prevents his recovery in this action. *Ide v. Churchill*, 14 id. 373; *Shock v. Miller*, 10 Penn. St. 401; *Klinginsmith v. Klinginsmith's Ecr.*, 31 id. 460. See, also, Story's Eq. Juris., § 325.

Conant & Robinson, for defendants in error, cited 4 S. & M. 165; 16 Ala. 465; 8 N. H. 389; Parsons on Merc. Law, 249; Smith on Merc. Law, 586; Adams' Eq. 573; 1 Parsons on Contracts; 31 Ala.

Camp v. Bostwick.

505; 11 B. Monroe, 397; *Fletcher v. Jackson*, 23 Vt. 581; 11 Story's Eq., § 497; 17 Mass. 464.

McILVAINE, J. The plaintiffs assign for error the following:

1. The court of common pleas erred in overruling the demurrer to the petition.

2. The court erred in rendering judgment in favor of defendant in error upon the pleadings.

3. The facts stated in the second defense being admitted, judgment should have been for plaintiffs in error.

4. The court found in favor of defendant in error, when it should have found for plaintiffs in error.

5. The findings of the court are contrary to the law and the facts.

Substantially the same questions of law arise upon the several assignments.

The original action was brought under favor of the 227th and following sections of the administration act (S. & C. 610, 611), providing for the commencement of actions against the heirs, etc., of deceased persons, after the settlement of the estate and after the expiration of the time limited for the commencement of actions against the personal representatives, etc., in cases where the right of action first accrues after the happening of those events.

Section 101 of the same act (S. & C. 585) provides, that no executor or administrator, after having given notice of his appointment, etc., shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four years from the time of his giving bond, etc. This provision, however, is subject to a modification in section 1 of the act of February 5, 1847 (S. & C. 614), "That any creditor of the estate of any deceased person, whose cause of action shall accrue, or shall have accrued, after the expiration of four years from the time that the executor or administrator of such estate shall give or shall have given bond according to law, and before such estate is fully administered, may commence and prosecute such action at any time within one year after the accruing of such cause of action and before such estate shall have been fully administered; and no cause of action against any executor or administrator shall be adjudged barred by lapse of time, until the expiration of one year from the accruing thereof."

That the right of the action on the note, as against the estate of Olinstead, was barred from and after the 11th day of December

Camp v. Bostwick.

1862, cannot be doubted. And if Bostwick's cause of action is founded on the note simply by subrogation to the rights of Giddings, it is also barred as against the heirs of Olmstead.

But this action was not founded on the note. The note was fully paid and satisfied by the payment of Giddings' judgment by Bostwick, on the 19th of November, 1866. By that payment, however, a new cause of action accrued to Bostwick against the representatives of his deceased co-surety, founded upon a "general equity," which equalizes burdens and benefits among co-sureties. This new cause of action never did accrue to Giddings, and it first accrued to Bostwick only forty days before suit was commenced.

Bostwick was under no legal or equitable obligation to Olmstead's *estate* to pay the Giddings note, during the four years of its administration.

A moral and equitable obligation to each other rested equally upon both the sureties to pay a moiety of that debt, during the whole of that period, as they were each legally and equally bound to pay Giddings, not a moiety, but the whole of his claim.

And had the estate of Olmstead discharged its legal obligation to Giddings to pay the whole of the debt, and its moral obligation to pay a moiety, the unequal burden which Bostwick was afterward compelled to bear would not have raised an equity against its representatives.

The proposition, "that the right to contribution is based on the principle that both sureties were liable, and that the payment by one discharges the other from a liability which, but for the payment, the other would be bound to meet," and "that inasmuch as Olmstead's estate was discharged by the statute of limitations before Bostwick paid the debt, it (the estate) was relieved of no burden and received no benefit from the payment" and, therefore, is not liable to contribute, cannot be maintained.

If the right of a co-surety to claim contribution rested upon the doctrine of subrogation to the rights of the creditor, the proposition might be true.

The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal is, in equity, substituted in the place of the creditor, and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of co-sureties or other joint promisors in the same degree of obligation.

Camp v. Bostwick.

It is not founded upon the contract of suretyship. 1 Ohio St. 327, and 1 Cox, 318. It is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt. 4 Grattan, 268. From this relation the common law *implies a promise* to contribute in case of unequal payments by co-sureties. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of co-sureties, because it is just and right in good morals, and not because of any supposed promise between them. This equity having once arisen between co-sureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party can take it away. 11 N. H. 431; 4 Grattan, 387; 1 Met. 387-9; 17 Mass. 464; 3 Denio, 62; 13 S. & R. 441; 16 Ala. 465; and 4 Greenl. 195.

It cannot be said that Bostwick voluntarily paid this debt, or any part of it. If he was legally liable to Giddings, his payments were compulsory, in a legal sense.

He was liable, by the terms of his contract, to pay the whole debt if his principal failed to do so. And such was the obligation of Olmstead also. Whittlesey did not pay, but died utterly insolvent. The promise of Bostwick was in writing, and was binding for fifteen years under our statute of limitations, as to him.

Nor did the neglect of Giddings to bring his action against the estate of Whittlesey, or the estate of Olmstead release Bostwick from his liability for the whole debt. In *Sibley v. McAllaster* (8 N. H. 389), the court say, "it is very apparent that if the principal die, and his estate is administered in the insolvent course, the creditor is under no obligation to present his claim to the commissioners, and procure what he may from that estate. He has a right in such a case to look to the surety for the whole amount." In *Johnson v. Planters' Bank* (4 S. & M. 165), the court say, "a creditor is not bound to active diligence against the principal to preserve the liability of the surety. If he merely remain passive, the liability of the surety is unimpaired. Neglect to present the claim to the administrator of the principal within the time prescribed by law

does not discharge the surety." The same rule is held in 11 N. H. 431, and 16 Ala. 465.

And if the neglect of the creditor, whereby the principal's estate is released, will not discharge the liability of the surety, it follows, with greater reason, that like negligence, whereby one surety's estate is released from direct liability to the principal, will not discharge its equitable obligations to a co-surety.

It is therefore clear that Bostwick was not a volunteer.

Nor was Bostwick barred by the statute of limitations from setting up and proving his payment of \$300 on the 8th day of May, 1863. That sum was his own share of the debt as between him and Olmstead's estate. Its payment gave him no right for contribution, for, if the estate of Olmstead had at any time afterward paid the balance, the condition of the sureties would have been in accordance with their equities.

Lord ELDON in *Ex parte Gifford*, 6 Ves. 805, says, "that unless one surety should pay more than his moiety; he would not pay enough to bring an assumpsit against the other." And PARKER, B., in *Davies v. Humphreys*, 6 M. & W. 152, says, "if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive."

Among co-sureties the right to demand contribution does not arise until one has paid more than his proportion of the common liability.

We find no substantial error in the record of the court of common pleas.

SCOTT, C. J., and WELCH, WHITE and DAY, J.J., concurred.

Judgment affirmed.

PHILLIPS *et al.*, plaintiffs in error, v. GRAVES AND WIFE.

(30 Ohio St. 371.)

Married woman — charging separate estate of.

A married woman may charge her separate estate to the extent that the liabilities may be incurred for the benefit of such estate, or for her own benefit, upon the faith of her separate property. Such power is incident to the unqualified ownership of property, and is only limited by the terms of the instrument creating the estate, or by implication arising therefrom.

The intention of a married woman to charge her separate estate, at the time her liability was incurred, may be either expressed or implied. Such intention may be implied, from the fact that she executed a note, bond or other obligation for the indebtedness; and courts of equity will enforce the payment of such obligation against her separate estate, first, by subjecting her personal property; second, by sequestering the rents and profits of the realty, and, third, by sale of the realty when the same is necessary.

ACTION by Phillips *et al.* against Graves and wife, for the purpose of charging the separate estate of the wife with the payment of a claim for the price and value of a piano-forte sold and delivered by the plaintiffs to her on the 18th day of April, 1866, for which she executed to them a written instrument, as follows:

"\$510. Received of Philip Phillips & Co. a No. 4 Bradbury piano, valued at five hundred and ten dollars, to be paid for by the 20th day of May, 1866.

"NEW CARLISLE, OHIO, April 18, 1866.

E. B. GRAVES "

The allegations of the petition are in substance as follows:

1st. The coverture of said defendant Elizabeth at the time of sale.

2d. That she then was, and still is, the owner of a large estate of real and personal property, and chuses in action, of great value, to wit, \$19,000 and more, which is under her sole control and exclusive management, and which she owns in fee simple, in her own right, and as her own separate property, and from which she annually receives, for her own separate use, an income of more than \$1,000.

3d. That the defendant, Benjamin Graves, husband of said Elizabeth, at the time of said sale, had no property, nor is he now possessed of any property, of any kind, subject to levy and sale on execution, or otherwise, for the payment of debts.

4th. That said Benjamin acquiesces in, and consents to, the acts

of management, control and disposition, by said Elizabeth, of her separate property.

5th. That said piano-forte was purchased by said Elizabeth for her own benefit and for her separate use and property.

6th. That, at the time of the sale of said piano-forte, it was agreed and understood by and between said plaintiffs and said Elizabeth, that the same was sold upon the credit of her separate property, and that she intended to and did charge her separate estate and income with the payment thereof.

7th. That said claim is due, and that said defendants have neglected and refused to pay the same.

And the plaintiffs, having specifically described in the petition the separate property of said Elizabeth, pray for an account, etc., and that the amount found due them may be charged upon the separate estate and income of said Elizabeth, and for other and further relief, etc.

Defendants demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action.

This demurrer was sustained by the court of common pleas, and final judgment was rendered in favor of defendants.

From this judgment an appeal was taken to the district court and the case was therein reserved for decision here.

The case now stands upon general demurrer to the petition.

Goode & Bowman, for plaintiffs in error, cited *Hurdy et al. v. Van Harlingen*, 7 Ohio St. 208, 214, and cases there cited; 1 White & Tudor's Lead. Cas. in Eq. (3d ed. 1859), top pp. 501, 506, 507, 528, *et seq.*, and cases there cited; *Jaques v. Methodist Church*, 3 Johns. Ch. 17; *Yale v. Dederer and Wife*, 18 N. Y. 265; *Gardner v. Gardner*, 7 Paige, 112.

J. Warren Keifer, for Mrs. Graves, argued that the intention to charge the separate estate of the wife must be expressed in the instrument creating the liability. *Yale v. Dederer*, 22 N. Y. 450-456; *M. E. Church Case*, 7 Johns. Ch. 77, 110; *Thomas v. Folwell*, 2 Whart. 11.

McILVAINE, J. (after stating facts). By the rules of the common law, married women are placed under many and severe disabilities, both as to their personal and property rights, intended, according to a favorite maxim, "in the most part for their protection."

Whatever may be the reason of the law, the rule is maintained, "that the legal existence of the wife is merged in that of the husband, so that, in law, the husband and wife are one person."

The husband's dominion over the person and property of the wife is fully recognized. She is utterly incompetent to contract in her own name. He is entitled to her society and her service; to her obedience and her property. All her personal chattels are absolutely his; and her choses in action, when reduced to his possession, and the right to so reduce them at his will and pleasure. He has an unqualified right to the use of her realty during coverture, and an estate for life, in the event of her death, if she bear him a child born alive, etc.

In consideration of his marital rights the husband is bound to furnish the wife a home and suitable support. He owes her protection, and is liable for her debts contracted before marriage.

Such is a brief but general outline of a married woman's legal status, as declared and enforced in common-law courts.

Courts of equity, however, do not fully adopt the theory, nor follow the practice of courts of law, in relation to the rights and responsibilities of husbands and wives, as between themselves, or in their relation to others.

A fundamental distinction exists at the very threshold of their jurisprudence. Equity recognizes the separate existence of the wife, and regards her as a rational and responsible subject of its jurisdiction; entitled to its protection and amenable to the decrees of a court of conscience.

At an early period in the history of equity jurisprudence, a married woman was considered capable of possessing property for her own use. For the protection of her natural rights and to enable her to discharge her moral obligations, equity devised for her a separate estate over which the husband was not permitted to exercise his dominion. This estate, at first, was created by deed of settlement to trustees for her sole use and benefit, over which courts of equity exercised jurisdiction to the exclusion of courts of law. A power of appointment in favor of the wife was inserted in the deed, and the trustees, for her benefit, were compelled to fulfill her appointments. Both real and personal property were embraced in this new creation.

In the progress of time, courts of equity dispensed with the necessity of the power of appointment, and held that the *jus dis-*

ponendi was a necessary incident to the ownership of property, as well the separate property of married women as other property.

At length the intervention of trustees was held to be unnecessary, and equity recognized the capacity of a married woman to take a direct grant for her separate use.

This principle was gradually developed until it became fully settled "that, however a wife's property might be acquired, whether through contract with her husband before marriage, or by gift from him or from a stranger, independently of such contract, equity would protect it, if duly set apart as her separate property, no matter though the husband himself must be held as the trustee to support it." Schouler's Dom. Rel. 188.

This great change in the condition of married women was wrought without the aid of legislation. Courts of chancery in this, as in many other respects, recognized their own true function of making their rules work justice by accommodating their operation to the true relations of society.

Thus, a strange anomaly exists in English and American jurisprudence. Courts of law and courts of equity co-existent in the same realm—the former merging the legal existence of the wife in the husband; the latter recognizing her separate existence—the former declaring her incapable of acquiring, holding, or disposing of property; the latter recognizing her ability to acquire, control and dispose of her estate—the former denying her capacity to contract, or to sue or be sued—the latter enforcing her agreements by granting relief both for and against her!

And yet, no conflict of jurisdiction, for the simple reason, that courts of law take jurisdiction of the wife's general property and give it all to the husband, and courts of equity take exclusive cognizance of her separate estate and control it for her sole benefit. While the judge declares her contract absolutely void, the chancellor proceeds *in rem* and charges her separate estate as equity and good conscience require.

It is true that some of our American States have not kept equal pace with England in the development of the doctrine of the rights of married women, yet the decided weight of authority favors the conclusions to be announced in this case.

Hume v. Tenant, 1 Bro. C. C. 17, is a leading case in England. The bill in that case was filed to subject the separate estate of the wife to the payment of a bond given by the husband and wife.

LORD THURLOW, recognizing the doctrine of an older case, in which the wife, having contracted to sell her separate estate (being authorized by settlement to do so), was held by the court to a specific performance of the contract, as a person equally competent to contract, as if sole, says: "I take it, therefore, it is impossible to say but that a *feme covert* is competent to act as a *feme sole* in respect to her separate property, when settled to her separate use. But the question goes a little beyond that: It is not only how far she may act upon her separate property—I have no doubt about that; but the question is, how far her *general personal engagements* shall be executed out of her separate property. If she had by instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, I think she, and her trustees, might have been decreed to make the disposition; but if she enters into an engagement which would make a *feme sole* liable to the whole extent of the contract, as to her person, etc., in every respect, it is clear such general engagement, entered into by a *feme covert*, will not bind her as such. It is not like the case of an infant, who is incapable of acting; but in respect to a *feme covert*, determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply her personal estate, and rents and profits when they arise, to the satisfaction of such *general engagements*." And, in conclusion, he says, "I have no doubt about this principle, that, if a court of equity says a *feme covert* may have a separate estate, the court will bind her to the whole extent, as to making that estate liable to her own engagements; as for instance, for the payment of her debts," etc.

In the case of *Murray v. Barlee*, 3 My. & K. 220, Lord BROUGHAM, having referred to the legal status of a *feme covert*, says: "But in equity the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may; and it may be reached through a suit instituted against herself and trustees. And it may be added, that the current of decisions has generally run in favor of such recognition. This principle has been supposed to be carried further in *Hume v. Tenant* than it ever had been before, because, there, a bond in which the husband and wife had joined, and which, indeed, so far

as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could only be reached by *implication*; and though, till then, the better opinion seemed to be that the wife could only bind her separate estate by a direct charge upon it. Lord ELDON repeatedly expressed his doubts as to this case, but it has been constantly acted upon by other judges, and never, in decision, departed from by himself."

And in the same case his lordship says: "I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can, and the very object of the settlement, which vests it in her, is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly incumbered it. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterward her *intention* was more regarded, and the court only required that she *intended* to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it."

In *Owens v. Dickinson* (1 Cr. & Ph. 48), Lord COTTENHAM, with reference to the wife's written agreement, observes, "that within the authority of cases which have been decided, it would have been operative upon the *feme covert's* separate estate, but not by way of the execution of a power. * * * It cannot be an execution of a power, because it neither refers to the power, nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. * * * Equity lays hold of the separate estate, but not by virtue of anything expressed in the contract, and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken by Lord THURLOW, in *Hume v. Tenant*, is more correct. According to that view, the separate property of a married woman, being a creature of equity, it follows, that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it: and inasmuch as her creditors have not

the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

In *Murray v. Barlee* (*supra*), Lord BROUGHAM says: "If in respect of her separate estate, the wife is, in equity, taken as a *feme sole*, and charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly speaking, her power of affecting her separate estate, shall only be exercised by a written instrument? Are we to invent a rule to add a new chapter to the statute of frauds, and require writing where that act requires none? Is there any equity reaching written dealings with the property which extends not also to dealings in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to be squandered away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

And in *Tullet v. Armstrong* (4 Mylne & Craig, 377), Lord COTTENHAM says: "When this court first established the separate estate, it violated the laws of property between husband and wife; out it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy a separate estate as a *feme sole*, the laws of property attached to this new estate; and when it was found, as a part of such laws, that the power of alienation belonged to the wife, and was destructive of the security intended for it, equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against it."

And in the same case, the court say: "It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill or promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate; and, therefore, the inference is conclusive that there was an intention, and a clear one, on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound." 4 Beav. 319; 18 Eng. Ch. 404.

From these authorities, and many others that might be referred to, we find the English rule to be, that courts of equity, upon the

principle that the *jus disponendi* is an incident to the absolute ownership of property, will charge the separate estate of a married woman with the payment of debts arising upon her general engagements, whether verbal or in writing, when her intention so to charge them is either expressed or implied, unless she is restrained by the terms of the instrument creating the separate estate from exercising such power of disposition.

In the United States, there is a great diversity of opinion upon this subject.

In South Carolina, it is denied that the *jus disponendi* is incident to the separate estate of a married woman. It is there held that a married woman cannot dispose of or encumber her separate estate, unless authorized so to do by the terms of the instrument creating the estate. 1 Hill's Ch. 228; 3 Desaussure, 460.

The same doctrine seems to prevail in Massachusetts, Pennsylvania, Rhode Island and Tennessee. 13 Gray, 328; 2 Whar. 11; 1 Rawle, 231; 2 R. I. 355; 8 Humph. 159, 209.

In New York, the *jus disponendi* is recognized to the fullest extent; not only where the liability was incurred for the benefit of the estate, and for the benefit of the wife upon the faith of her separate property (7 Paige, 114; 20 Wend. 570; 2 Sandf. Ch. 287; 22 N. Y. 450), but in a very recent case before the commission of appeals (42 N. Y. 613, appendix; 1 Am. R.), it was held that an action is maintainable upon a married woman's indorsement of a promissory note as *surety*, for the purpose of charging her separate estate.

But in all the cases in that State it is held that equity will charge the separate estate with the payment of the wife's debts only when she declares her intention to make it liable in the very contract which is the foundation of the debt, unless the consideration of the debt be for the benefit of the estate itself.

This rule is in conflict with the English doctrine, as we have seen, and it is believed to be in conflict with the decisions of every other State in the Union, where the *jus disponendi* is held to be incident to the separate estates of married women.

If the powers of disposition were exercisable only within or under a power of appointment contained in the instrument creating the estate, and by its terms limited to appointments by writing only, the New York rule would, undoubtedly, be right. But, inasmuch as a separate estate is created, where no power of appointment is

Phillips v. Graves.

granted by the terms of the instrument creating it, we believe that, for the sake of its enjoinder in accordance with the intent of the grantor, the power of control and disposition attaches of necessity under and by virtue of the general laws of property, unless restrained by the terms of the instrument. And if the *jus disponendi* attaches, without limitation or restraint, we believe with Lord BROUGHAM, in *Murray v. Barlee* (*supra*), that we are not authorized "to invent a new chapter in the statute of frauds, and declare that the only mode of exercising such power shall be by a written instrument."

And if a writing is not necessary to evidence the intention of a married woman to charge or dispose of her separate estate, we fully agree with Lord COTTENHAM, in *Tullet v. Armstrong* (*supra*), that such intention may be shown by parol; by proof of express declarations, or circumstances from which it may be inferred.

The existence of a married woman's separate estate has been frequently recognized and defined by this court.

In *Hardy v. Van Harlingen* (7 Ohio St. 208), it was held that equity will treat a wife, in respect to her separate estate in a legacy, as if she were a *feme sole*.

In *Machir & Wife v. Burroughs* 14 (Ohio St. 519), it was held that "a married woman, unless restrained by the terms of the instrument of settlement, may, by her contract, and without the consent of trustees in whom the title may be vested, charge her separate estate, at least to the extent of the rents, issues and profits thereof, with the cost of reasonable repairs and improvements for the benefit of the estate."

That a married woman may charge her separate estate as if she were a *feme sole*, and that courts of equity will proceed *in rem* to compel the payment of debts contracted by her on the credit of her separate estate by sequestration, appears to be settled doctrine in the following States: Arkansas, 17 Ark. 189; Kentucky, 16 Ben. Monroe, 492; Mississippi, 27 Miss. 343; North Carolina, 7 Ired. Eq. 111; Florida, 6 Fla. 381; Maryland, 11 Md. 492; New Jersey, 1 McCarter, 178, and 3 Green's Ch. 512; Missouri, 23 Mo. 457; Georgia, 12 Ga. 195; Wisconsin, 15 Wis. 365; Alabama, 26 Ala. 332.

That the intention of a married woman to charge her separate estate with the payment of a debt may be inferred from the fact that she executes a note or bond for the debt, has been held in Arkansas, 1 Ark. 189; Kentucky, 7 Ben. Monroe, 293, and 13 id. 384;

New Jersey, 3 Green's Ch. 512; Missouri, 23 Mo. 457, and Alabama, 26 Ala. 332.

It is claimed further by the defendants, that the act of 1861, entitled "An act concerning the rights and liabilities of married women," and the act amendatory thereof, passed in 1866 (S & C. 389, 390-1), which were in force at the time the cause of action herein arose, prescribe the only rules in this State in relation to the separate property of married women; and that the only remedies in force for subjecting the separate estates of married women to the satisfaction of their liabilities are those specified in those enactments. We have carefully considered these propositions, and have come to the following conclusions, to wit:

These statutes do not nor were they intended to abridge the powers or restrain or limit the jurisdiction of courts of equity, in relation to the separate estates of married women; but, on the other hand, they do enlarge the jurisdiction of the chancellor, in so far as the general property of married women is charged, by the force of these statutes, to separate property.

The legislative intention was to change the *legal* status of married women, and declare their *legal* "rights and liabilities." The common law, in so far as its rules are incompatible with the provisions of these enactments, is abrogated or modified. The remedies therein provided may be enforced by courts of common-law jurisdiction. And to the extent that courts of law are by these statutes invested with a remedial jurisdiction heretofore exercised by courts of equity exclusively, the remedies are cumulative, and the jurisdiction concurrent.

The principle controlling this question is stated by Story (1 Story's Eq. Jur., § 80) as follows: "In modern times, courts of law frequently interfere, and grant remedies, under circumstances in which it would certainly have been denied in earlier times. And sometimes the legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. Now, in neither case, if courts of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of authority at law in regard to legislative enactments. For, unless there are prohibitory or restrictive words, the uniform interpretation is that they confer concurrent and not exclusive remedial authority."

In *Mitchel v. Otey* (23 Miss. 236), it was held, "that the 'married

woman's law,' giving remedies by action at law, does not oust the original jurisdiction of courts of equity in cases affecting the separate estates of married women."

In *Todd v. Lee* (15 Wis. 380), the court, in reference to a similar statute of that State, say: "The contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law. All her other engagements stand as before the passage of the statute, good only in equity. The change from an equitable to a legal estate has not, with respect to them, enlarged her powers, or removed the disability of coverture; but she remains as if still possessed of an estate in equity, without restriction as to her power of disposition." See, also, 18 N. Y. 265.

It is also claimed by defendants that the second section of the act providing "for the proof, acknowledgment and recording of deeds and other instruments of writing" (1 S. & C. 461), stands directly in the way of the doctrine that a married woman may charge her separate estate with the payment of debts, except in the mode pointed out in this section.

We are not called upon in this case to determine whether a court of equity in this State would decree the specific performance of a married woman's contract to execute a deed, or mortgage, or other instrument of writing for the conveyance or incumbrance of her separate estate.

But we may observe that the only office of the statute referred to is to prescribe the mode and the only mode in which the legal title to lands and tenements in this State may be transferred or otherwise affected, by act or deed of the owner. It treats only of legal evidence of title, or interests in land. The same mode, substantially, is prescribed for men and unmarried women and wives. But in neither case does the statute affect the power of a court of chancery to charge equities upon lands and tenements, or attempt to define what may or may not be an equity chargeable upon real estate.

Finally, we have arrived at the following conclusions:

1. That a married woman, possessed of a separate estate of real or personal property, may charge the same with her debts, at least to the extent that the liabilities may be incurred for the benefit of such estate or for her own benefit, upon the faith of her separate property.

2. That such power is incident to the unqualified ownership of property, and is only limited by the terms of the instrument creating such estate, or by implication arising therefrom.

3. That the intention to charge her separate estate, at the time her liability was incurred, may be either expressed or implied.

4. That such intention may be implied from the fact that she executed a note, bond or other obligation for the indebtedness.

5. That courts of equity will enforce the payment of such charges against such property, through a receiver, 1st, by subjecting her personal property; 2d, by sequestering the rents and profits of the realty; and, 3d, by sale of the realty when the same is necessary.

6. That the jurisdiction of courts of equity, in this behalf, is not abridged or limited by virtue of the statutes "concerning the rights and liabilities of married women."

7. That the legislative intention in enacting these statutes was to modify or enlarge the *legal* rights and liabilities of married women.

8. That the statute providing "for the proof, acknowledgment and recording of deeds and other instruments of writing," is not incompatible with the equitable power of a married woman to charge her separate estate with debts incurred within the scope of the rules herein stated.

Demurrer to petition overruled and cause remanded.

WELCH, WHITE and DAY, JJ., concurred.

SCOTT, C. J., did not sit in this case.

NOTE.—See *The Corn Exchange v. Babcock*, 1 Am. R. 801.

INDEX.

ABATEMENT.

See BANKRUPTCY, 3.

ACTION.

1. The heirs of real estate cannot sue upon a covenant against incumbrances broken during the life of the person under whom they claim the estate. The administrator is the proper party plaintiff. *Frink v. Bellis*, 193.
2. A stream of water flowed in a well-defined channel across a highway and through defendant's land, until a great freshet came when it left the old channel and made a new one down the highway and flowed over plaintiff's land. Plaintiff then turned the water back to its old channel in defendant's land. Subsequently the highway surveyor, without authority, closed up the old channel and thereby caused the water to flow upon defendant's land in various places, whereupon defendant used such means to relieve his land as to cause the water to flow again in the channel formerly made by the freshet, and upon plaintiff's land. *Held*, that this was an invasion of plaintiff's rights, for which he could maintain an action without waiting for damaging effects from the water. *Tuthill v. Abbott*, 301.

See BANKRUPTCY, 2, 3; PAYMENT, 1; TENANT IN COMMON.

ADEMPTION.

A husband died leaving an unsatisfied ante-nuptial contract in favor of his wife, and a will declaring it to be his wish that his executors should "see that his contracts are fulfilled, and that his wife have a dowry" of a specified amount. The wife filed a bill in chancery to recover upon the marriage contract; also a petition in the probate court to recover the legacy. *Held* (1), that the court of chancery had jurisdiction to enjoin her from the further prosecution of the suit in the probate court; and (2) that parol evidence of the situation of the testator, the condition, character, etc., of his property, was admissible to ascertain his intention to adeem, the will not being explicit on this point, and, if such intention should be established, to ascertain whether the legacy should be taken as a satisfaction in full or *pro tanto*. *Gilliam v. Chancellor & Murray*, 493.

ADJOINING PROPRIETORS.

See ADJUT, 2.

ADMINISTRATOR.

Where there is unnecessary delay in making a final settlement of the funds in the hands of administrators, interest will be required of them; and where they use the funds so retained in private speculation, they will be liable for compound interest. *Johnson's Administrators v. Hedrick*, 191.

See ACTION, 1; JUDGMENT.

AGENCY.

See HUSBAND AND WIFE, 2; INSURANCE, 4, 15.

AGREEMENT TO FIGHT.

See ASSAULT AND BATTERY.

ALTERATION.

See PROMISSORY NOTE, 11.

ARBITRATION.

See AWARD.

ARREST.

1. A constable or police officer is not bound to procure a warrant, before arresting a person whom he has probable cause to believe guilty of a felony, even though there may be no reason to fear the escape of such person in consequence of the delay in procuring the warrant. *Wade v. Chaffee*, 572, and note, 574.
2. The privilege from arrest of a member of congress, under the provisions of the constitution, does not extend to forty days or more before and after a session, but is limited to a reasonable time for going and returning. *Hopple v. Jencks*, 596.

See PLEADING; REWARD.

ASSAULT AND BATTERY.

In an action for assault and battery, the fact that plaintiff and defendant fought by agreement, or mutual consent, is no bar to the recovery, but may be considered in mitigation of damages. *Adams v. Waggoner*, 230.

ASSIGNMENT.

See INSURANCE, 1, 2, 6, 7, 14.

ATTACHMENT.

See BANKRUPTCY, 1.

ATTORNEY.

1. Participation, by an attorney, in making pretended gifts as a means of giving notoriety to an exhibition, innocent in itself, is not sufficient ground to authorize his name to be stricken from the roll. *Dickens' Case*, 420.

2. An attorney, who conspires to get an opposing attorney drunk, in order to gain an advantage in a cause about to come on, is liable to expulsion from the bar therefor. *Id.*

See CHAMPERTY, 2; STATUTE OF LIMITATIONS, 2.

ATTORNEY'S LIEN.

The parties to an action, in which defendant had been defaulted and the case continued, made a settlement. *Held*, that plaintiff's attorneys were not entitled to have judgment rendered in favor of plaintiff against defendant to secure a lien for counsel fees. *Hooper v. Welch*, 267.

AWARD.

When arbitrators are constituted by the parties the judges of the law, the facts and the equity of the case, their award will not be annulled if it appear that it is, within the terms of the submission, fairly construed, and furnishes a rule sufficiently certain to define and limit the rights of the parties, and under which those rights may be enforced—no mistake of law or of any material fact appearing on the face of the award, or by admission of the arbitrators, nor any partiality or corrupt conduct on their part, or misbehavior in the parties, being pretended. *Harris v. Social Manufacturing Company*, 549.

BAGGAGE.

1. Where baggage is carried past its destination by a railroad company, stored at the wrong station, stolen, and thereby lost to the owner, the company will be liable as common carrier. *Toledo, Wabash and Western R. R. Co. v. Hammond*, 221, and note, 224.
2. An opera glass may be included in the articles of baggage for which a common carrier is liable. *Id.*

See COMMON CARRIER, 1, INNKEEPER.

BANK.

1. By an act of the Indiana legislature, passed in March, 1867, shares of the capital stock of national banks within the State were taxed for that year, and the cashier of each bank was required to represent each stockholder in listing and valuing his stock. *Held*, that the statute took effect from the first day of January, 1867, and that it was a valid exercise of the taxing power, and that it did not conflict with the constitutional requirement of "a uniform and equal rate of assessment and taxation." *Whitney v. Ragsdale*, 185.
2. Where a bill or check is payable to order, a banker has authority to pay to any person who becomes holder by a genuine indorsement; but the banker cannot charge his customer with payments made otherwise, unless (1) the circumstances amounted to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsement, or (2) were equivalent to a subsequent admission that the indorsement was genuine, in reliance on which the banker was induced to so alter his position as to preclude the customer from showing the indorsement to be forged. *Dodge v. Nat. Exch. Bk.*, 651.

3. Plaintiff being the owner of a certificate of indebtedness of the United States, indorsed it in blank and mailed it to a paymaster. It was stolen from the mail and presented to a paymaster by the thief, who represented himself to be plaintiff, and requested a check, saying that he could identify himself at the bank. The paymaster accordingly gave him a check, payable to plaintiff's order, on defendant bank. The bank paid the check to the bearer without inquiry, on the forged indorsement of the plaintiff's name. The paymaster, with notice of plaintiff's claim, subsequently lifted the check, and was charged with its amount in his settlement with the bank. *Held* (1), that plaintiff's claim against the defendant bank was not affected by the paymaster's negligence in not requiring the person to whom the check was given to identify himself; (2) that plaintiff's claim was not affected by the subsequent settlement of the paymaster with the bank; and (3) that plaintiff could ratify the giving of the check in his name, thus making it his own, and maintain an action against the bank for the amount. *Id.*

BANK-BOOK.

See GIFT.

BANKRUPTCY.

1. A discharge in bankruptcy will not prevent a creditor from taking a decree *in rem* against a fund upon which he obtained a lien, by trustee attachment, more than four months prior to the commencement of the proceedings in bankruptcy. *Stoddard v. Locke*, 808.
2. A discharge in bankruptcy, obtained after the commencement of an action on a promissory note provable as a debt under the bankrupt act, when pleaded in bar of such action, may be attacked therein by showing that it was obtained upon proceedings of which the plaintiff was fraudulently deprived of notice. *Batchelder v. Low*, 811.
3. An action at law does not abate by the bankruptcy of the plaintiff, and if the assignee in bankruptcy be discharged, without any interference by him with the suit, it may proceed in the name of the bankrupt, the presumption, in the absence of any proof to the contrary, being that the action is proceeding for the benefit of the true owner, whoever he may be. *Conner v. Southern Exp. Co.*, 543.
4. The passage of the bankrupt law of the United States, of 1867, suspended the operation of a State insolvent law, so far as the provisions of the former applied to the subject-matter of the latter. *In the matter of Reynolds*, 615.

BELLIGERENTS.

See INTEREST, 1.

BILL OF LADING.

See COMMON CARRIER, 3, 4, 5.

BONA FIDE HOLDER.

See PROMISSORY NOTE, 4, 6, 9, 10, 11.

INDEX.

(21)

BOND.

See FRAUD; RATIFICATION, 2.

BONDS.

See COUPONS; INTEREST, 2.

BREACH OF CONTRACT.

In an action to recover for a breach of a contract to deliver logs to be sawed at plaintiff's mill,—*Held* (1), that the fact that the plaintiff's mill after he was notified by the defendants that they would pay for no more sawing, and deliver no more logs, or that he made a sub-contract with some other person to saw the logs that might be delivered, could not affect the right of recovery, or the measure of damages; (2) that the measure of damages was the contract price of sawing, less the cost of doing the work, in labor, in wear and tear of machinery, in time of use of machinery, and value of superintendence. *Dunn v. Johnson*, 177.

See SALE, 1, 2; MEASURE OF DAMAGES.

BURDEN OF PROOF.

In an action for the purchase-money under an agreement for the sale of land by which the plaintiff bound himself to give possession and execute a warranty deed upon the payment of the purchase-money, the declaration alleged that plaintiff had at all times been ready and willing to perform his part of the agreement; but the defendant pleaded that the plaintiff was not seized of the land agreed to be conveyed. *Held*, that under the issue thus raised plaintiff was called upon to prove his title. *Negley v. Lindsay*, 427.

See COMMON CARRIER, 5.

BURYING GROUND.

See CEMETERY.

CARRIER.

See COMMON CARRIER.

CEMETERY.

The purchaser of a lot in a cemetery for "burial purposes" does not take any title to the soil; and an act of the legislature, directing the vacation and sale of the cemetery and the removal of the bodies, is not an unconstitutional infringement of his rights. *Kincaid's Appeal*, 877.

CHAMPERTY.

1. Champerty is an offense against the law, whether regard be had to the ancient common law, the English statutes upon the subject, or to the legislative acts of Rhode Island, and therefore avoids every contract into which it enters. *Martin v. Clarke*, 586.
2. A contract between an attorney and counselor-at-law and a client, that the attorney shall prosecute a claim at his own cost and charge, for a part of the subject in litigation, is champertous, illegal and void. *Id.*

CHATTEL MORTGAGE.

1. A chattel mortgage contained a condition that if, at any time, the mortgagee should feel himself "unsafe" or "insecure," he might take immediate possession of the property wherever it could be found. The mortgagor, without the knowledge or consent of the mortgagee, sold the property to an innocent vendee. In an action by the mortgagee against the vendee to recover the property, *held* (1), that trover would lie; (2) that the mortgagee need not prove, as a condition precedent to his recovery, that other property covered by the mortgage was insufficient to satisfy the debt, or that he had been unable to reduce such other property to possession; and (3) that the question, whether the mortgage was duly acknowledged and recorded, should not be submitted to the jury. LAWRENCE Ch. J., McALLISTER and THORNTON, JJ., dissented. *Bailey v. Godfrey*, 157, and *note*, 161.
2. A mortgage of goods containing a provision allowing the mortgagor to retain possession of them, and to sell them "in the usual retail way," but requiring him to "pay over the money received therefor to the mortgagee as the goods are sold," is, upon its face, a valid mortgage. BRINKERHOFF, Ch. J., and WELCH, J., dissented. *Kleine v. Katzenberger*, 680.

CHECK.

See BANK, 2, 8.

CHURCH.

The title to the church property of a divided congregation is in that part, though a minority, which adheres to the ecclesiastical laws, usages and principles of the denomination under which the church was constituted. *Schnorr's Appeal*, 415.

CHURCH DEBT.

See SUBSCRIPTION.

CHURCH EDIFICE.

See STATUTE OF FRAUDS.

CIVIL WAR.

See INTEREST, 1; REBELLION; TAXATION, 4, 5, 6, 7, 8.

CLOUD ON TITLE.

See TITLE.

COMMON CARRIER.

1. In an action against a railroad company for the loss of baggage, it appeared that the baggage had arrived at its destination and been placed in the depot by the company, where it was stolen by burglars during the night. *Held*, that the baggage "should have been stored in a safe and secure warehouse to exonerate the company" from liability as a common carrier. *Bartholomew v. St. Louis, Jacksonville and Chicago Railroad Co.*, 45.
2. In an action against defendants, as common carriers, to recover damages occasioned by an alleged neglect of duty in failing to deliver a number of car loads

- of corn at Cairo, Illinois, within a reasonable time after receiving it for transportation, whereby it became heated and of little value; *held* (1), that defendants were not discharged from liability under a clause in the receipt releasing them from loss on "perishable property," corn not being such in the commercial sense; (2) that it was no defense that the military authorities of the United States had ordered defendants to give a preference to the property of the government in transportation, where they failed to show any interference on the part of army officers which prevented them from sending this corn forward in the usual time; (3) that it was no defense that the track at Cairo was obstructed with cars filled with rejected government corn, where the evidence showed that, immediately after the rejection of such corn, the government officers ceased to control it, and it relapsed into the hands of defendants, who could have unloaded it in a day or two; (4) that if the corn was shipped under a special contract, the contract price should be taken as the basis for estimating the damages; otherwise the market price at Cairo at the time the corn ought to have arrived, must govern. *Ill. Cent. R. R. Co. v. McClallen*, 83.
3. Where a railroad company, as common carrier, receives goods marked for transportation beyond its line, it assumes the common-law liability for loss or damage, whether occurring on its own or another line; but a receipt specifying that it will not be liable for any loss unless occurring on its own line, will be construed as a special contract, limiting its liability to its own line, if it is found, by a jury, that the consignors understood the terms of the receipt and assented to them. *LAWRENCE, McALLISTER and THORNTON, JJ., dissented. Ill. Cent. R. R. Co. v. Frankenberg*, 92, and note, 98.
 4. A railroad company, bound by a bill of lading to deliver goods on payment of freight and "presentation of a duplicate" bill, is responsible if it makes delivery without such presentation. Such a clause in a bill of lading is for the benefit of the consignor. *McEwen v. Jeffersonville, Madison and Indianapolis R. R. Co.*, 216.
 5. A bill of lading given by a railroad company on receipt of goods for transportation contained the following clause: "The dangers incident to railroad transportation, fire and all other unavoidable accidents, excepted." The goods were destroyed by fire, and, in an action against the company to recover their value, *held* (1), that the exception of loss by "fire" was a limitation upon the common-law responsibility of the company; (2) that the exception was of "fire," whether *unavoidable* or not, provided it was not by the negligence of the company; and (3) that the burden of proof of negligence was upon the plaintiff, the common-law liability being thus changed. *Colton v. Cleveland and Pittsburgh R. R. Co.*, 424, and note, 426.
 6. One who keeps a ferry for his own use and for the convenience of customers to his mill, but who charges no ferriage, is not a common carrier, and is only bound to ordinary diligence. *Self v. Dunn*, 544.
 7. A common carrier of passengers is not liable for the negligent destruction of money kept in the custody of the passenger and carried by him, without notice to the carrier, for a purpose unconnected with the expenses of the journey. *First National Bank of Greenfield v. R. R. Co.*, 655.
 8. Where plaintiff intrusted a package of money to his agent to carry, and the agent, while a passenger on a railroad, was killed, and the money which was carried on the agent's person, without notice to the railroad company, was

destroyed by the company's negligence, it was *held*, that the company was not liable for the loss of the money, either on the ground of its duty as common carrier, or by virtue of the maxim, *sic utere tuo, ut alienum non laedas*. *Id.*

See BAGGAGE.

CONFEDERATE MONEY.

1. In an action on a promissory note, it appearing that the agreement was to pay in Confederate money, though not so expressed upon the face of the instrument, *held* that no recovery could be had. *Donley v. Tindall*, 284, and note, 241, 242.
2. *Held*, also, that parol evidence was admissible to show that the real undertaking was that the note should be paid in Confederate money, though not so expressed in the instrument. *Id.*
3. In an action by the payee of a promissory note against the maker, it appeared that the note was made in 1859, and that in 1863 the plaintiff voluntarily surrendered the note to the defendant, and received the amount called for in Confederate money. *Held*, that plaintiff could not recover, although the money received in payment was illegal and worthless. *Ritchie v. Sweet*, 245.
4. A. executed his promissory note to B., in 1861, payable in United States currency. In 1862, A. gave B. certain claims, also payable in United States currency, for collection, directing him "to exercise his discretion as to procedure to be taken in enforcing collection." B. accepted payment of the claims in Confederate currency. In an action against A., on the note, brought in 1868, by the administrator of B., *held*, that the full amount of the collected claims in United States currency was a valid set-off. *Mangum v. Ball*, 488.

CONFLICT OF LAWS.

See DIVORCE.

CONSIDERATION.

See DEED, 2; PROMISSORY NOTE, 1, 14, 16; TAXATION, 7; VOLUNTARY AGREEMENT, 8.

CONSIGNOR AND CONSIGNEE.

See COMMON CARRIER, 4.

CONSTABLE.

See ARREST, 1.

CONSTITUTIONAL LAW.

1. A railroad company, to which the absolute sale of a State dam on a navigable river was made, held a charter from the State, in which there was no power of change or revocation reserved. Subsequently the legislature passed an act requiring every individual or corporation, having or maintaining any dam on the river, to construct and maintain a sluice, or other device, for the free passage of fish. The railroad company assigned its interest in the dam to a canal company formed after the passage of the fish act. On an indictment against

the canal company for a failure to comply with the act, *held*, that the power to cause the changes to be made in the dam was within the right of eminent domain; but that the act was unconstitutional, in so far as it imposed the burden of expenses of the changes upon the canal company, because it authorized the "taking of private property for public use without compensation." *Commonwealth v. Pennsylvania Canal Co.*, 829.

- 2 A railroad company was not compelled by its charter to make or rebuild fences along its track. By an act of the legislature it was made the duty of the company to repair fences along its line, "destroyed by fire caused by the running of trains or by the employees of the road." *Held*, a valid exercise of the police power of the State. *Pennsylvania R. R. Co. v. Riblet*, 860.

See BANK, 1; CEMETERY; GROUND-RENTS; MUTUAL WILLS; TAXATION, 2, 3, 4, 5.

CONSTRUCTION OF INSTRUMENT.

See WILL.

CONTRACT.

See SUNDAY; BURDEN OF PROOF.

CONTRIBUTION.

1. A contract by which the author of a libel agrees to indemnify the publisher thereof is void. *Atkins v. Johnson*, 260, and note, 264-5.
2. Where a person is injured in passing over a defective bridge, which two counties are jointly bound to keep in repair, and recovers judgment of one county, the other is liable to contribution. *Armstrong County v. Clarion County*, 368.
3. The rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act. *Id.*
4. The estate of a deceased surety of a principal debtor was discharged from liability to the creditor, through his negligence, by operation of the statute of limitations. A co-surety afterward paid the debt. *Held*, that the estate was liable to contribute to such co-surety, notwithstanding it was released from direct liability to the creditor. *Camp. v. Bostrick*, 609.

CONTRIBUTORY NEGLIGENCE.

- 1 In an action to recover for injuries received by the son of plaintiff in consequence of the alleged negligence of defendant in placing barrels and a counter on a public street, it appeared that the son was twelve years old, and that, in passing on the sidewalk, he put his hands upon the counter, as if to jump upon it, when it fell and fractured his leg. *Held* (1), that the age and discretion of the boy were subjects of consideration by the jury; (2) that, as the negligence of defendant was much greater than that of the boy, plaintiff could recover; and (3) that evidence tending to show permanent injury, as affecting the amount of damages, was properly submitted to the jury. *Kerr v. Forgue*, 146, and note, 147-9.

2. A boy was warned off a gangway because it was a passage for laborers to pass through with iron, trucks, wheelbarrows, etc. He was subsequently in the gangway, when he was killed by the falling of a car negligently pushed off a tramway overhead. *Held*, that he was not guilty of contributory negligence, there being no reason to expect danger from the cars above. *Gray & Bell v. Scott and Wife*, 371.

See RAILROAD COMPANY, 3, 4, 5, 6.

CONVERSION.

In an action to recover for the conversion of wheat, the defendant is not entitled to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages. *Ellis v. Wire*, 189.

See CHATTEL MORTGAGE, 1.

CONVEYANCE.

Where the covenantee, in a deed of land, takes possession and conveys, a covenant of warranty in the deed to him will pass to his grantee, although the covenantor was not in possession at the time of his conveyance. *Wead v. Larkin*, 149.

See WATER PRIVILEGE.

COUNSEL FEES.

See ATTORNEY'S LIEN.

COUNSELOR.

See ATTORNEY.

COUPONS.

1. It is settled by the current of American authorities that a coupon bond is negotiable, and that its coupons may be detached and negotiated separately by simple delivery, and sued on separately from the bond, and this after the bond itself has been paid and satisfied, as well as before. *National Exchange Bk. v. Hartford, etc., R. R. Co.*, 582.
2. A coupon, once detached and negotiated, ceases to be a mere incident of the bond, and becomes an independent claim, and its amount, with interest after demand of payment, is recoverable under a general count in debt. *Id.*

See INTEREST, 2.

COVENANT.

See CONVEYANCE; PROMISSORY NOTE, 14.

DAM.

See CONSTITUTIONAL LAW, 1.

DAMAGES.

In an action against a town to recover for personal injuries sustained in consequence of defects in a highway, the town is not entitled to have the proceeds of an accident insurance policy of plaintiff deducted from the amount of damages. *Harding v. Town of Townsend*, 304.

See COMMON CARRIER, 2; CONVERSION; MEASURE OF DAMAGES; SLANDER.

DEED.

1. In an action for the purchase-money under articles of agreement for the sale of land, a deed containing a description like that in the articles is *prima facie* certain enough, and should not be excluded from evidence on the ground of *insufficiency* in the description. The question of such insufficiency is for consideration, subsequent to the admission in evidence. *Negley v. Lindsay*, 427.
2. A recital in a deed of land that the consideration has been paid, is only *prima facie* evidence of payment. *Parker v. Foy and Florer*, 484.

See CONVEYANCE; WILL.

DEPOSIT.

See GIFT.

DIVORCE.

A resident of Mexico married a wife in Texas, and took her to his home. She resided with him for two years, when she came to Texas and instituted proceedings for divorce against him for cruel treatment. He appeared and defended. *Held*, that the divorce might be granted, although similar causes might not be ground for divorce in Mexico. *Shreck v. Shreck*, 251.

See HUSBAND AND WIFE, 1.

DILIGENCE.

See INNKEEPER; RAILROAD COMPANY, 1, 2, 3, 4, 5, 6, 8.

DRUNKENNESS.

See INSURANCE, 16.

ECCLIESIASTICAL LAW.

See CHURCH.

EMBEZZLEMENT.

See WITNESS, 2.

EVIDENCE.

See CHATTEL MORTGAGE, 1; DEED, 1, 2; INSURANCE, 2; PAROL EVIDENCE; RAILROAD COMPANY, 2, 6; SALE, 2; SLANDER, 3, 6.

EXCAVATION.

The owner of a city lot, having determined to build, let parts of the work to different persons—to one the excavation, to another the stone-work, to another the superstructure; while himself delivered stone, lime and sand. *Held*, that the owner, and not the contractors, was responsible for an injury to a traveler, caused by the excavation being insufficiently guarded. *Homan v. Stanley*, 889.

EXECUTION CREDITOR.

See **INSURANCE**, 8.

EXECUTOR.

See **ADMINISTRATOR**.

EXPULSION FROM BAR.

See **ATTORNEY**.

FEEs.

See **OFFICER**.

FELONY.

See **ARREST**; **PLEADING**.

FENCES.

See **CONSTITUTIONAL LAW**, 2.

FERRYMAN.

See **COMMON CARRIER**, 6.

FIRE INSURANCE.

See **INSURANCE**.

FISH ACT.

See **CONSTITUTIONAL LAW**, 1.

FORGERY.

See **BANK**, 2, 8; **RATIFICATION**, 2; **PROMISSORY NOTE**, 5, 11.

FRAUD.

An illiterate man signed a paper, which was falsely represented to be a petition, but which was really a bond. *Held*, that he was not liable thereon, the plea of *non est factum* being good, although the obligee was not aware of the fraud, before accepting the bond. *Schuylkill County v. Copley*, 441.

See **PROMISSORY NOTE**, 2, 5, 6, 9, 10, 11, 14, 15; **RATIFICATION**, 1.

FRAUDULENT CONTRACT.

See **RATIFICATION**, 1.

GIFT.

The delivery of a savings bank pass-book containing the entries by the officers of the bank of the moneys deposited by a deceased wife, with a parol gift of the same by surviving husband when in *extremis*, is a valid *donatio causa mortis* of the money deposited in the bank. *Tillinghast v. Wheaton*, 621.

GOLD CONTRACT.

1. A promissory note executed subsequent to the passage of the legal tender act of congress of 1862, payable, in terms, in American gold, is not discharged by a tender of United States treasury notes. *McGorn v. Shirk*, 122.
2. A promissory note payable in "gold coin or the equivalent thereof in United States legal tender notes," is completely discharged by a payment in legal tender notes, dollar for dollar. *Killough v. Alford*, 249.

GOVERNMENT LAND.

See PRE-EMPTION, 1, 2.

GOVERNOR.

See MANDAMUS.

GRANTOR AND GRANTEE.

See PROMISSORY NOTE, 14; WATER PRIVILEGE.

GROUND-RENTS.

A act of the legislature providing for the extinction of irredeemable ground-rents by compelling the rent-owner, at the option of the land-owner, to receive a gross sum and release the rents, is unconstitutional. *Palatret's Appeal*, 450.

GUARANTY.

A. signed the following letter of credit to B.: "Mr. C. proposes to purchase some supplies of you * * *. In case you should let him have them, I will see the amount of his account with you paid * * * to the amount of \$400 * * *." *Held*, that the character of this letter of credit or guaranty entitled A. to notice that it was accepted and acted upon by B.; also to notice, within a reasonable time after the account was closed and the debt became due from C., that he had failed to make payment. *Montgomery v. Kellogg*, 508.

HEIR.

See ACTION.

HIGHWAY.

- 1 Plaintiff's horse, while he was backing it out of a shed where he had left it for convenience, backed into a gulf on the side of the highway, twenty feet from the traveled track. *Held*, that plaintiff could not recover damages from the town, for that the accident did not occur in using the highway for strictly traveling purposes, and that the gulf was not within the ordinary limits of the highway. *Sykes v. Town of Pawlet*, 295.

2. For injury sustained by a traveler on a highway, from the falling upon him of some object from an adjacent building, as a sign insecurely fastened, a town is not liable under the statute requiring towns to keep highways in "good repair." *Taylor v. Peckham*, 578, and note, 581.

See CONTRIBUTION, 2; DAMAGES; EXCAVATION; RAILROAD COMPANY, 6.

HUSBAND AND WIFE.

1. C. married M., a female guardian, who continued to exercise her guardianship after the marriage. Subsequently she obtained a divorce *a vinculo*. *Held*, that he was not relieved by the divorce from liability for her debts under the guardianship contracted before and during coverture. *Allen v. McCullough*, 27.
2. A wife's authority in business matters is special and limited, and when she exceeds that authority her husband is not bound. *Goodrich v. Tracy*, 281.
3. A judgment in favor of a wife against her husband, rendered by default in a court of law, is valid. *Simmons v. Thomas*, 470.

See ADEMPMENT; INSURANCE, 15; WITNESS, 1

ICE.

Under a statute making it an indictable offense to remove, without license, from the lands of another, "any tree, stone, timber, or other valuable article," *held*, that ice formed in a stream not navigable was a part of the realty, and a "valuable article." *Stale v. Pottmeyer*, 224.

INDICTABLE OFFENSE.

See ICE; SLANDER, 4.

INDORSER.

See PROMISSORY NOTE, 7, 8, 13.

INDORSEMENT.

See PROMISSORY NOTE, 7, 8, 13.

INFANT.

See CONTRIBUTORY NEGLIGENCE, 1.

INNKEEPER.

An innkeeper is bound to extraordinary diligence in preserving the property of his guest intrusted to his care, where the guest has complied with all reasonable rules of the inn. And if the guest, on departing from the inn, leaves his or her baggage with the innkeeper, with his consent, he is liable for its safe-keeping as an innkeeper, for a reasonable time, according to the circumstances of the case. *Adams v. Clem*, 524.

INNOCENT PURCHASER.

See BONA FIDE HOLDER; RIPARIAN RIGHTS, 4.

INSOLVENT LAWS.

See BANKRUPTCY, 4.

INSURANCE.

FIRE.

1. Where a policy of fire insurance is assigned as collateral to a mortgage, with the consent of the company, the assignee takes it subject to the conditions thereof, and no recovery can be had merely in consequence of the equities of the assignee, if the assignor has lost the right to recover by violating the terms of the contract. *Illinois Mut. Fire Ins. Co. v. Fitz*, 88.
2. In an action by the assignor of a policy of fire insurance for the use of the assignee, evidence to show that plaintiff set the building on fire is admissible. *Id.*
3. It seems that a clause in a policy of fire insurance prohibiting a second insurance without the consent of the company is valid. *Id.*
4. Plaintiff, at the solicitation of the agent of a fire insurance company, signed an application for a policy wherein it was provided that the policy should take effect from the day the application was approved, and gave his note for the premium. The agent gave a receipt for the note, at the same time promising plaintiff that the policy would take effect from the date of the application. The application was sent to the principal office, and was rejected; but, before the agent had informed plaintiff of the failure of the negotiations, the property proposed to be insured was destroyed by fire. *Held*, that there was no valid contract of insurance. *Winneshiek Ins. Co. v. Holzgrafe*, 64.
5. A renewal of a policy of fire insurance is, in effect, a new contract of insurance, and, unless otherwise expressed, on the same terms and conditions as the original policy; and a notice that the insured premises had become vacant, required and given under the original policy, should be given again under the renewed policy, the same state of vacancy continuing. *Hartford Fire Ins. Co. v. Walsh*, 115.
6. A mortgage does not come within the provisions of a policy of fire insurance, prohibiting, without consent, any change "in the title or possession of the property, whether by sale, voluntary transfer or conveyance." *Id.*
7. A policy of fire insurance was issued on buildings by a company whose charter declared that, whenever any buildings insured should be alienated, the policy should thereupon be void, "*provided, however*, that the grantee or alienee having the policy assigned may have the same ratified and confirmed * * * upon application to the directors, and with their consent, within thirty days next after such alienation." The buildings covered by this policy were conveyed, and the policy was assigned by the assured. A loss by fire occurred on the eighth day after the alienation, whereupon the company were immediately informed of the loss, and an application was made by the assignee for a ratification. The company refused, arbitrarily and without cause; and, on a bill brought in chancery praying for relief,—*Held*, that the assignee was entitled to recover of the company for the loss, the same as if they had ratified the assignment. *Boynton v. Farmers' Mut. Fire Ins. Co.*, 276.
8. A., having obtained a judgment against B., levied execution upon premises owned and insured by B. Subsequently the premises were destroyed by fire.

Held, that A. was not entitled to the proceeds of the insurance policy. *Plimpton v. Farmers' Mut. Ins. Co.*, 297.

9. It is a sufficient compliance with a condition in a policy of fire insurance requiring that, in case of loss, "the insured shall forthwith give notice thereof to the secretary," where a sworn statement of the fact and circumstances of the fire, signed by the assured the morning after the fire, was forwarded, on the following day, by the agent, to the secretary of the company. *Beatty v. Lycoming County Mut. Ins. Co.*, 818.
10. It is not a sufficient compliance with a condition in a policy of fire insurance, on "household furniture \$367" and "groceries \$233," requiring that, in case of loss, "the insured shall * * * within thirty days deliver to the secretary a particular account" of the loss, where the statement sent by the insured is a mere reiteration of the description in the policy: "household furniture \$367," and "groceries \$233;" and the fact that the company received such a statement at the end of twenty days, but gave no notice of insufficiency, is not a waiver of the condition demanding a "particular" statement. *Id.*
11. A policy of fire insurance upon buildings contained a stipulation, "that the aggregate amount insured in this and other companies * * * shall not exceed two-thirds of the estimated cash value." The insurance was for \$1,800, and the estimated cash value, according to the policy, was \$1,950; subsequently improvements were made and an additional insurance of \$1,000 was effected in another company. The buildings were destroyed by fire; and their value at the time of the fire was \$4,200. In an action on the first policy, *held*, that the "estimated cash value" was that at the time of the first insurance; and that the first policy was void for over-insurance. *Elliott v. Lycoming County Mut. Ins. Co.*, 323.
12. Where an insurance company, after notice or knowledge of over-insurance, makes and collects assessments under the policy upon the assured, a forfeiture for over-insurance is thereby waived; but where an assessment is made by the agent of the company, by mistake, but is not collected and is never paid, this does not constitute a waiver of the forfeiture. *Id.*
13. Where a policy of fire insurance is issued upon a house and stable, and an over-insurance is made upon the house, a tender of the amount insured on the stable, in case of loss by fire, is not an affirmance of the insurance as to the house so as to preclude the company from setting up a forfeiture. *Id.*
14. A policy of fire insurance contained the following condition: "Policies of insurance, subscribed by this company, shall not be assignable without the consent of the company expressed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease." The policy was assigned, without consent of the company, as collateral security for a debt. A loss by fire occurred, and the insured redeemed the policy. *Held*, that he could not recover thereon. THOMPSON, Ch. J., dissented. *Perre v. Oxford Fire and Life Ins. Co.*, 436.

LIFE.

15. Where one, representing himself to an insurance company to be a married man, effects an insurance on his own life for the benefit of his alleged wife

and as her agent, when in fact the marriage is void by reason of the reputed wife having a former lawful husband living at the time, and the policy contains a provision that any false statement by the assured shall invalidate it; *held*, that the policy is not void by reason of the illegality of the last marriage, unless it appears that the said reputed husband and wife knew at the time the insurance was effected that at the time of their supposed marriage the lawful husband was living, and the marriage illegal, and failed to inform the company of the fact. *Equitable Life Ins. Co. v. Peterson*, 535.

16. *Held*, also, that death from an over-dose of laudanum, taken by mistake, while in a drunken condition, is not dying "by his own hand;" but death from laudanum taken with intent to destroy life, though while in a drunken condition, would be dying "by his own hand." *Id.*

MARINE.

17. In an action on a policy of marine insurance issued upon a cargo of corn, it appeared that only a portion of the corn was damaged. *Held* (1), that, by the terms of the policy, loss, if any, being "payable to the Bank of Montreal in funds current in the city of New York," the premium on gold should not be allowed in estimating the amount to be paid by the insurers; (2) that the measure of damages, in such cases, is not the difference between the market value of sound and damaged corn, but such a proportion of the valuation fixed in the policy as the difference between the market value of sound and damaged corn bears to the market value of sound corn; (3) that charges for surveys, inspection and sale at auction, being reasonable, are part of the loss; and (4) that amounts paid for insurance while retaining the cargo in store, and charges for storage, being unreasonable, are not part of the loss. *Lamar Insurance Co. v. McGlashen*, 162.

See DAMAGES.

INTEREST.

1. Interest continues to run in time of civil war on debts due from a citizen of one belligerent to a citizen of the other. *Spencer v. Brower*, 254, and *note*, 255.
2. Interest, by way of damages, is recoverable upon the overdue coupons or interest warrants of railroad bonds, from the time of demand and refusal of payment. *Whitaker v. Hartford, etc., R. R. Co.*, 547.

See ADMINISTRATOR; COUPONS, 2.

INTOXICATING LIQUOR.

See PROMISSORY NOTE, 16.

JUDGMENT.

- A judgment against an administrator, in the form that "plaintiff have and recover from the defendant's administrator" the sum adjudged, is sufficient, although the better mode would be to have added the words, "to be levied of the goods and chattels of his intestate, in his hands to be administered." *Quice v. Sellers*, 476.

See HUSBAND AND WIFE, 8.

INDEX.

JURISDICTION.

See ADEMPION.

LAND OFFICERS.

See PRE-EMPTION.

LEGAL TENDER.

See GOLD CONTRACT.

LETTER OF CREDIT.

See GUARANTY.

LEX LOCI CONTRACTUS.

See SUNDAY.

LIBEL.

See CONTRIBUTION, 1.

LIEN.

See ATTORNEY'S LIEN; REAL ESTATE.

LORD'S DAY.

See SUNDAY.

MALICE.

See SLANDER, 2, 5, 6.

MANDAMUS.

A writ of mandamus is not issuable from the supreme court to the governor of the State, to direct him, as commander-in-chief, to perform a duty which is properly within the sphere of his duties as commander-in-chief, though the same is imposed upon him by a statute of the State. *Mauran v. Smith*, 564, and note, 572.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE.

See INSURANCE, 15.

MARRIAGE AND DIVORCE.

See DIVORCE.

MARRIAGE-SETTLEMENT.

See ADEMPION.

MARRIED WOMAN.

- 1 A married woman may charge her separate estate to the extent that the liabilities may be incurred for the benefit of such estate, or for her own benefit, upon the faith of her separate property. Such power is incident to the unqualified ownership of property, and is only limited by the terms of the instrument creating the estate, or by implication arising therefrom. *Phillips v. Graves*, 675, and note, 686.
2. The intention of a married woman to charge her separate estate, at the time her liability was incurred, may be either expressed or implied. Such intention may be implied from the fact that she executed a note, bond or other obligation for the indebtedness; and courts of equity will enforce the payment of such obligation against her separate estate, first, by subjecting her personal property; second, by sequestering the rents and profits of the realty, and, third, by sale of the realty when the same is necessary. *Id.*

See HUSBAND AND WIFE.

MASTER AND SERVANT.

In an action by plaintiff against a railroad company to recover for the death of the intestate, while in the employ of the company, caused by the carelessness of an engine-driver, *held*, that the following instruction contained the rule of law applicable to the case: "If the jury believed, from the evidence, that both the deceased and the engine-driver, at the time deceased was injured, were in the employment of the railroad company, and that their ordinary occupations in such service bore such relations to each other that the careless or negligent conduct of the engine-driver endangered the safety of the deceased, then such danger was incident to the employment of the deceased, and the plaintiff cannot recover." *Chicago and Alton R. R. Co. v. Murphy*, 48.

See RAILROAD COMPANY, 8.

MAXIMS—"SIC UTERE TUO."

See MINES.

MEASURE OF DAMAGES.

In an action for damages on a contract which plaintiff was prevented from completing through the fault of defendant, the measure of damages is, not the price agreed to be paid in full performance, but recompense for the part performed, together with indemnity for the loss to plaintiff in respect to the part unperformed. *Friedlander v. Pugh, Slocomb & Co.*, 478.

See COMMON CARRIER, 2; BREACH OF CONTRACT; CONTRIBUTORY NEGLIGENCE, 1; INSURANCE, 17; RAILROAD COMPANY, 2; SLANDER, 1, 3 5. 6.

MEMBER OF CONGRESS.

See ARREST, 2.

MILITARY POSSESSION.

See COMMON CARRIER, 2.

INDEX.

MILL OWNER.

See RIPARIAN RIGHTS, 2, 3, 4.

MINES.

By a decree in partition, the surface of an estate containing a coal deposit was severed from the underlying mineral, and the parts were allotted to different heirs without limitation. *Held*, that the mineral-owner was liable to the surface-owner for injury to buildings, etc., upon the surface, caused by not leaving proper supports in mining the coal. In such a case all the coal belongs to the mineral-owner, but the maxim *sic utere tuo ut alienum non laedas* applies. *Jones v. Wagner*, 385.

MINOR.

See CONTRIBUTORY NEGLIGENCE, 1.

MISTAKE.

See PROMISSORY NOTE, 12; MUTUAL WILLS

MORTGAGE.

See CHATTEL MORTGAGE; INSURANCE, 6; PRE-EMPTION.

MUNICIPAL CORPORATION.

See CONTRIBUTION, 2; DAMAGES; HIGHWAY; NUISANCE.

MUTUAL WILLS.

A husband and wife each had a will drawn in favor of the other. After the husband's death it was found that each, by mistake, had signed the will of the other, to remedy which error the legislature passed a special act, authorizing the court to reform the will in case the mistake was proved. *Held*, that there was, in law, no will; that, at the death of the husband, his estate vested in his heirs; and that the subsequent legislation was invalid, the effect of it being to divest estates. *Alter's Appeal*, 433.

NATIONAL BANK.

See BANK.

NAVIGABLE STREAM.

See RIPARIAN RIGHTS, 1.

NEGLECTENCE.

See COMMON CARRIER, 1, 5, 7, 8; MASTER AND SERVANT; PROMISSORY NOTE, 4, 9, 10, 11; RAILROAD COMPANY, 1, 2, 3, 4, 5, 6, 8.

NOTICE.

See BANKRUPTCY, 2; GUARANTY; INSURANCE, 10; REAL ESTATE; RIPARIAN RIGHTS, 4.

NUISANCE.

In an action against defendant, for pulling down and removing plaintiff's livery stable, an ordinance of the town council ordering such removal is no defense, the nuisance not being caused by the erection itself but by the persons who resorted there. *Miller v. Burch*, 242.

OFFICER.

A. assumed the duties of an office under an apparent claim of right, and it was subsequently judicially determined that the office belonged to B. *Held*, that B. could recover of A. the fees and emoluments received by him, while in office, after deducting the necessary expenses in earning them. *Mayfield v. Moore*, 52.

See ARREST, 1; REWARD.

OVER-INSURANCE.

See INSURANCE, 11.

OWNER.

See EXCAVATION.

PARENT AND CHILD.

See VOLUNTARY AGREEMENT.

PAROL CONTRACT.

See CONFEDERATE MONEY, 1; INSURANCE, 4; PROMISSORY NOTE, 3, 7.

PAROL EVIDENCE.

The rule which forbids the introduction of parol evidence to contradict, add to or vary a written instrument, does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law. *Martin v. Clarke*, 586.

See ADEMPMENT; CONFEDERATE MONEY, 2.

PARTIES.

See ACTION, 1.

PARTNERSHIP.

A promissory note given after the dissolution of a partnership, by one partner, without the authority of the other, does not bind such other, although given in the partnership name and for a partnership debt. *Haddock v. Crocheron*, 241.

See PROMISSORY NOTE, 15.

PART PERFORMANCE.

See MEASURE OF DAMAGES.

PASSENGER.

See COMMON CARRIER, 7, 8; RAILROAD COMPANY, 1, 2, 4, 6.

INDEX.

PAYMENT.

1. A voluntary payment is irrecoverable by action. *Gibson v. Bingham*, 289.
2. The acceptance of a note of \$40 is satisfaction of a note of \$60, and the simultaneous surrender of the larger note is a full discharge thereof. *Draper v. Hitt*, 292.
3. A tender, made subject to the condition that if the amount offered is accepted it will be in full payment of all claims, is invalid. *Id.*

See PROMISSORY NOTE, 5.

PLEADING.

A plea justifying an arrest on suspicion of felony, without a warrant, should set forth the grounds of the suspicion, so that the court may judge of them, and determine whether they afford probable cause or not. *Wade v. Chaffee* 572 and note, 574.

PRACTICE.

See BANKRUPTCY, 2, 3; STATUTE OF LIMITATIONS, 3.

PRE-EMPTION.

1. M. purchased government land, but B. soon entered upon it as a pre-emptor, claiming to have commenced a settlement and improvement on it previous to the purchase by M. The pre-emption claim was contested, but it was held good by the land officers. It having been appealed to the secretary of the interior, *held*, that the decision of the land officers was conclusive as to the right of pre-emption. *Robbins v. Bunn*, 75.
2. A mortgage upon government land given by the pre-emptor, after an entry and certificate received, but before patent issued, is not invalid under the twelfth section of the pre-emption law of 1841, providing that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," the words, "the right hereby secured," being construed to mean simply the right of pre-emption. *Id.*

PREFERRED STOCK.

See STOCK.

PRINCIPAL AND SURETY.

See CONTRIBUTION, 4; PROMISSORY NOTE, 6.

PRIVILEGED COMMUNICATION.

See SLANDER, 6.

PROMISSORY NOTE.

1. B. bought a horse of A. for the Confederate cavalry service, and gave a promissory note for the purchase-money. *Held*, that bare knowledge on the part of A. that B. intended to make an illegal use of the horse did not vitiate the note. *Tedder v. Odom*, 25.
2. Where a person signs a paper, believing it to be an ordinary contract for service, which afterward proves to be, or to contain, a negotiable promissory

- note, such person having exercised reasonable precaution and prudence to avoid fraud and imposition, is not liable on the note to an assignee before maturity. *Taylor v. Atchison*, 118, and note, 121.
8. The maker of a non-negotiable promissory note signed and delivered to the payee, to enable him to negotiate it, a separate writing, as follows: "This is to show that the note * * * is all right and will be paid when it comes due." The note was assigned, and, after it became due, the assignee, upon the promise of the maker that he would pay it at a specified time, forbore to sue. In an action on the note by the assignee against the maker, *held* (1), that, notwithstanding the writing, the defense of want of consideration and fraud would be valid (ELLIOTT, J., dissenting); but (2) that the promise constituted a new and enforceable contract. (GREGORY, Ch. J., dissenting.) *Jaqua v. Montgomery*, 168.
 9. Plaintiff knowing the maker, but not the payee of a negotiable promissory note of \$300, bought it before due, at a discount of \$50, from a stranger, who refused to guarantee its payment. *Held*, that the circumstances were sufficient to put plaintiff on inquiry as to the consideration of the note. *Gorie v. Stevens*, 265, and note, 266-7.
 10. The receipt of a new promissory note, a signature to which is afterwards found to be forged, does not operate as a payment of the original note or an extinguishment of the right of action thereon. *Goodrich v. Tracy*, 281.
 11. A. signed a promissory note as surety for B, with the understanding that B. was to use it in raising funds for prosecuting a profitable business. But B. gave the note to C., the payee, in payment of a pre-existing debt. *Held*, that A. was liable on the note to C., who was innocent of the fraud. *Quinn v. Hard*, 284.
 12. A. and B., the indorsers of a promissory note, agreed verbally, at the time of the indorsement, that they would be jointly liable in case the maker failed to pay. *Held*, that the agreement was provable and enforceable. *Ross v. Espy*, 394.
 13. The contract of indorsement is not within the rule which excludes proof to alter or vary the terms of an *express* agreement. *Id.*
 14. The purchaser before due, and without notice, of a negotiable promissory note, fraudulent as between the original parties, gets good title thereto, although he took it under circumstances which ought to excite the suspicion of a prudent man. *Phelan v. Moss*, 402, and note, 411.
 15. Gross negligence is not enough to vitiate the title of a holder for value of a negotiable promissory note; *mala fides* must be shown. *Id.*
 16. The maker of a promissory note, in the usual form, is negligent in leaving a blank between the words indicating the amount for which the note is drawn and the word "dollars;" and, although the blank is fraudulently filled up after delivery, so as to increase the amount, the alteration being imperceptible, the maker is liable to an innocent holder for value, for the face of the note. *Garrard v. Haddon*, 412.
 17. A second indorser of a promissory note, who, by mistake or inadvertence, writes his name above the first indorser, and is called upon to pay a portion of the note, may recover the amount so paid from the first indorser. *Stick v. Kirk*, 438.
 18. A promissory note, payable to order, "with interest, waiving the right of

- appeal and all valuation, appraisement, stay and exemption laws," is negotiable. *Zimmerman v. Anderson*, 447.
14. In an action on a promissory note given for the purchase-money for the conveyance of lands with covenants of warranty, evidence of the grantor's want of title is inadmissible, there being no suggestion of fraud, of eviction, or of insolvency. The grantee must rely upon the covenants in his deed. *Guico v. Sellers*, 476.
15. After the dissolution of a partnership, A., one of the partners, without authority, gave a new note in the name of the firm, in renewal of an old six per cent partnership note, and, without intent to defraud, made it to bear ten per cent interest, and included in it an individual liability of B., another partner. D., another partner, subsequently promised to pay the new note, supposing it to be a simple renewal of the old note. In an action on the new note, *held*, that, as the considerations were severable, D. was liable for the amount of the old note, with interest at six per cent. *Wilson v. Forder*, 627.
16. A promissory note, the consideration of which is illegal in part, is wholly void. So *held* where a part of the consideration was the purchase-money of intoxicating liquors, sold in violation of statute. *Widoe v. Webb*, 664.
- ~~17.~~ CONFEDERATE MONEY; GOLD CONTRACT; PAYMENT, 2; PARTNERSHIP; SUNDAY; TAXATION, 7, 8.

PROXIMATE AND REMOTE DAMAGES.

See RAILROAD COMPANY, 3.

RAILROAD COMPANY.

1. Plaintiff purchased a ticket at L. on defendant railroad, for A., and got upon a freight train, while it was moving slowly. The conductor took the ticket; the train did not stop at A., and plaintiff in getting off was injured. *Held* (1), that if plaintiff left the train voluntarily, although at the suggestion of the conductor, it was a question for the jury whether he acted as a prudent man, under the circumstances; (2) that, as the train was a freight train, and not advertised to stop at A., the taking up of the ticket did not imply an undertaking on the part of the company to put plaintiff off safely at that place. *Chicago and Alton R. R. Co. v. Randolph*, 60.
2. In an action against a railroad company to recover for injuries sustained by a passenger, *held* (1), that evidence of the attending physician was admissible as to what effect the injuries would have upon the future condition of plaintiff, and as to how the injuries had affected his mind, although there was no declaration that the injuries had been willful; (2) that the phrase "extraordinary care," in the charge to the jury, was equivalent to "greatest care," "utmost care," the "highest degree of care," that being the degree of care legally required in his case; and (3) that railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, they will be liable therefor. *T. W. and W. R. R. Co. v. Baddeley*, 71.
3. A building belonging to a railroad company took fire from sparks from one of their engines, and from this building fire was blown across the street to

the storehouse of P., which, with several thousand dollars in money contained therein, was consumed. In an action by P. to recover for the loss, *held* (1), that it was a question for the jury whether the company had taken reasonable precautions to prevent the escape of sparks from the engine; (2) that, as the loss of the money could have been prevented by reasonable efforts for its preservation, the company were not responsible as to it; (3) that the question whether the injury sustained was too remote, was for the jury. *Toledo, Peoria and Warsaw Railway Co. v. Pindar*, 57.

- 4 In an action against a railroad company to recover for the death of a passenger, it appeared that the train, upon which deceased was traveling, having stopped at a station, remained a reasonable time for passengers to alight, but he, not availing himself of the opportunity, waited until the train began to move, when, in attempting to leave the cars, he was fatally injured. *Held*, that the company was not liable, there being no proof of mismanagement of the train or careless conduct of the employees. *Ill. Cent. R. R. Co. v. Slotton*, 109.
- 5 Landowners contiguous to railroads are as much bound, in law, to keep their lands from an accumulation of dry grass and weeds as railroad companies are; and when a fire is ignited on a railroad company's right of way, and is communicated in consequence of such accumulations to fields adjoining, the negligence of the owner will be held to have contributed to the loss, and unless it appears that the negligence of the company is greater than that of the landowner, the latter cannot recover. *Chicago and Northwestern R. R. Co. v. Simonson*, 155, and note, 157.
- 6 In an action against a railroad company to recover for causing the death of plaintiff's decedent, *held* (1), that the declarations of the fireman of the train which caused the death, made soon after the accident, as to the speed of the train, the position of the deceased, and the giving of the customary signal, were inadmissible; (2) that it is negligence for one approaching a railway crossing not to use the sense of sight and hearing to discover a coming train, and that, in the absence of special statute, the omission of all signals at crossings is not negligence *per se* on the part of the railroad company. *Bellefontaine Railway Co. v. Hunter*, 201, and note, 216.
7. A railroad company, or any contractor employed by them to build a railroad, may use any material removed by them in grading the road, either in the adjacent, or, it seems, in other localities, but they have no right to sell such material to third parties. *Aldrich v. Drury*, 624.
8. A receiver operating a railroad is answerable in his official capacity for an injury to a servant employed on the railroad by reason of the negligence of the receiver, or the negligence of his agents in a position superior to that of the servant; and in determining the receiver's liability and the servant's right to recover, the same rules are to be observed as would be applicable were the company exercising the same powers of operating the road. *Mearns' Admr. v. Holbrook and Roosevelt*, 633.

See COMMON CARRIER, 1, 2, 3, 4, 5, 7, 8; CONSTITUTIONAL LAW; INTEREST ; MASTER AND SERVANT; STOCK; TAXATION, 1, 2.

RATIFICATION.

1. A contract tainted with fraud may be ratified without a new contract, founded on a new consideration. *Negley v. Lindsay*, 427.
2. The ratification of the signing of a bond, by an obligor whose signature was forged, does not render him liable thereon, there being no new consideration. *McHugh v. County of Schuylkill*, 445, and note, 447.

See BANK, 3; INSURANCE, 7; PROMISSORY NOTE, 15.

REAL ESTATE.

A sub-vendee taking the legal title to land, charged with a vendor's lien, and with notice, accepts the title *cum onere*, and is in no better position than the original purchaser; and whatever is enough to excite attention or put such sub-vendee on inquiry is notice. *Parker v. Foy and Florer*, 484.

See BURDEN OF PROOF; RAILROAD COMPANY, 7.

REBELLION.

A citizen, assisting Confederate soldiers in the capture of a Federal soldier, does not thereby render himself liable to a civil action by the captive. *Wright v. Winningham*, 85.

See TAXATION, 4, 5, 6, 7, 8.

RECEIPT.

See COMMON CARRIER, 3, 4, 5.

RECEIVER.

See RAILROAD COMPANY, 8.

REFORMATION.

See MUTUAL WILL.

REMOVAL OF CAUSE.

The right to remove a cause from the State to the United States court, under the act of congress of March 3, 1867, is terminated by a hearing or trial upon the merits in a court of competent jurisdiction, resulting in a final judgment or decree; and an appeal or second trial does not revive the right. *Horne Life Ins. Co. v. Dunn*, 642.

RENTS.

See GROUND-RENTS.

REWARD.

Plaintiff, a sheriff, captured a criminal without process and in reliance upon a general reward offered. *Held*, that the fact that he was a sheriff did not prevent his recovery of the reward. *Davis v. Munson*, 815.

RIPARIAN RIGHTS.

1. In the absence of prescription or user, it is not a public right to float logs down a non-navigable stream which is only fit for that purpose during periodical freshets; the bed and banks of such a stream are under the absolute ownership and control of the riparian owner. *Hubbard v. Bell*, 98, and note, 108-9.
2. The owner of a mill, whose dam and machinery are suited to the size and capacity of the stream, has a right to the reasonable use of the water to propel his machinery, but he must detain it no longer than is necessary for its profitable enjoyment, and he must return it to its natural channel before it passes upon the land of the proprietor below. *Pool v. Lewis*, 526.
3. What is a reasonable detention is a question for the jury, in view of all the facts in the case, taking into account the nature and use of the machinery, and the use of the water necessary to its profitable employment. If the owner detains the water no longer than is necessary for its profitable use, he is not liable in damages to the proprietor below. *Id.*
4. Where the owner of an iron furnace upon a stream claims that the owner of a mill above his works had bound himself by verbal contract that he would never stop the usual and constant flow of the water in the channel of the stream, and the owner of the furnace, after the death of the owner of the mill, stood by and saw the mill sold by the administrator of the deceased, to an innocent purchaser, and gave no notice of the verbal agreement between himself and the deceased, he is estopped from setting up the verbal agreement against the purchaser who invested his money without notice of it, and the parties stand upon their respective rights under the general law governing riparian proprietors in the use of the water in the stream. *Id.*

See ICE.

ROAD-BED.

See RAILROAD COMPANY, 7.

SALE.

1. Where an article, manufactured in accordance with a special contract, is accepted and retained by the vendee, he will be liable for the full contract price, there being no warranty, and the defects, if any, being obvious and patent; and in such a case a judgment obtained by the vendor for an unpaid balance of the contract price is a bar to an action by the vendee to recover for a breach of the contract. *Gibson v. Bingham*, 289.
2. In an action to recover the purchase-money of an article made under contract, the defense was that the article was not like the sample. *Held*, that evidence was admissible of the difference in the results produced by the sample and the imitation, as corroborative of their inherent difference. *Tilton v. Miller & Co.*, 378.

See BREACH OF CONTRACT; PROMISSORY NOTE, 1, 14, 16; ESTOPPAGE IN TRANSITU.

SAVINGS BANK BOOK.

See GIFT.

INDEX.

SEPARATE ESTATE.

See MARRIED WOMAN.

SET-OFF.

See CONFEDERATE MONEY, 4.

SHERIFF.

See REWARD.

SHERIFF'S SALE.

See STATUTE OF LIMITATIONS, 1.

SLANDER.

1. In an action for slander, the fact that the words were spoken in the heat of passion, or under excitement, may be shown in mitigation of damages, but not in bar of the action. *Moulter v. Harding*, 195.
2. Malice is essential to render slanderous words actionable; but when words actionable in themselves are spoken in a criminal sense, and are false, malice is implied from the speaking. *Id.*
3. In an action for slanderous words spoken in Pennsylvania, and charging the commission of adultery in Georgia, *held* (1), that the words, charging an offense of moral turpitude, punishable by the law of the State where they were uttered, were actionable *per se*; and (2) that the position in life, and the family of the plaintiff, were admissible in evidence as bearing on the question of damages. *Klumph v. Dunn*, 355, and note, 360.
4. In an action of slander, the words charged to have been spoken by the defendant were, that the plaintiff "had stolen corn out of G.'s field." *Held*, that if the conversation, in the course of which the alleged words were spoken, showed that the defendant referred to "standing corn," the plaintiff could not recover, the larceny of standing corn being only an indictable offense, made so by statute, but not of an infamous character, or subject to an infamous or disgraceful punishment. *Stitzell v. Reynolds*, 396, and note, 399, 400.
5. In an action of slander, the jury, in assessing the damages, may consider the degree of malice with which the alleged slanderous words were spoken, as shown by the subsequent acts and declarations of the defendant; but they cannot give damages for such acts and declarations, however infamous or criminal they may be. *Id.*
3. In an action of slander, *held* (1), that the slanderous sense of the words spoken is not to be determined by the understanding of the hearers, where the language is plain and direct; (2) that the question of malice is never to be determined by the opinion or understanding of the hearers; (3) that the defendant may prove that he was acting from a sense of moral and legal duty; (4) that express or actual malice need not be shown except in cases of privileged communications; (5) that, where the defendant pleads justification, he may prove the truth of the matter spoken, which will constitute a sufficient defense; (6) that the commencement of a malicious suit by a third person against plaintiff may be proved as the result of the slanderous words; (7) that, where a party introduces a witness, he does not thereby indorse his

credibility, although he cannot impeach such witness; and (8) that the repetition of slanderous words must be done from good motives and without malice, and the repeater must give, not only the precise words of the author, but the name of a responsible person against whom the injured party may bring his action. *Jarnigan v. Fleming*, 514.

SOIL.

See RAILROAD COMPANY, 7.

SPECIFIC PERFORMANCE.

See VOLUNTARY AGREEMENT.

STATEMENT.

See INSURANCE, 9.

STATUTE OF FRAUDS.

The right to use a church edifice to worship in when unoccupied by the church to which it belongs is an interest in real estate, and a contract therefor, to be valid under the statute of frauds, must be in writing, signed by the party to be charged. *Brumfield v. Carson*, 184.

STATUTE OF LIMITATIONS.

1. Defendant purchased certain premises at a sheriff's sale, but, failing to pay his bid, the premises were resold by the same sheriff nearly a year and a half afterward for a less sum. In an action to recover the difference between the two bids, *held*, that the statute of limitations began to run from the time of the failure to pay the first bid. *Funk v. Smith*, 326.
2. An attorney gave a receipt for a note which he agreed to collect. In an action to recover for neglecting to collect the note, *held*, that the statute of limitations did not begin to run from the date of the receipt, but from a reasonable time afterward for beginning proceedings, and that seventeen months was more than a reasonable time. *Rhines' Admrs. v. Evans*, 364.
3. Where proceedings for the contest of a will are commenced within the statutory period of limitation, although only part of the persons interested are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired. The plaintiff in such a case cannot, by dismissing his petition, put an end to the proceeding, where either of the defendants filed a cross-petition before the period of limitation had expired, or the original petition was dismissed. *Bradford v. Andrews*, 644.

See CONTRIBUTION, 4.

STOCK.

The holder of "preferred and guaranteed stock in the H., P. & F. R. R. Co. being entitled to preferred and guaranteed dividends, at the rate of ten per cent per annum, payable semi-annually, before any dividend shall be paid on other stock of said company," is entitled to this sum, payable only out of the earnings of the company which are legally applicable to the payment of dividends. *Tuft v. Hartford, Providence and Fishkill R. R. Co.*, 575.

STOPPAGE IN TRANSITU.

Where goods are sold on condition that title shall not pass until they are paid for, the vendor retains the right of stoppage *in transitu* as against the vendee, or an innocent third person who purchases of the vendee before the arrival of the bill of lading or the goods. *Pattison v. Cutton*, 199.

SUBSCRIPTION.

A person subscribed toward the payment of a debt due for the building of a church, and the trustees borrowed money to pay the debt on the faith of the subscription. *Held*, that the subscriber was bound. *Trustess v. Garvey*, 51.

SUNDAY.

1. Where a note was made and delivered in the purchase of a mining privilege at Pike's Peak, in Kansas, on the Sabbath day, and suit thereon is brought in the courts of this State, and there is no evidence of the *lex loci contractus* produced on the trial, *held*, that the presumption of law is, that the law of the place where the note was made is the same as our own; especially will such presumption be made where a contrary presumption would be unjust to the Christian civilization of the age, and in violation of the decalogue. *Hill v. Wilkes*, 540, and *note*, 542.
2. As the laws of this State forbid, under penalties, any violation of the Lord's day by the transaction of any business, trade or calling, a note made upon the Sabbath day, in pursuance of trade or business, will not be enforced by the courts of this State under the laws of this State, as such contract is void. *Id.*

SURETY.

See CONTRIBUTION, 4; PRINCIPAL AND SURETY.

TAXATION.

1. The stocks and bonds of an inter-State railway are liable to taxation by any State in which it is situate in proportion to the length of the road in such State. *Pittsburg, Fort Wayne and Chicago R. R. Co. v. Commonwealth*, 344.
2. The Pennsylvania portion of the Erie railway was constructed under a law of that State, by which it was compelled to pay for its franchise a fixed annual sum, and to submit to taxation on its stock. *Held*, that this did not preclude the State from levying a further and general tax upon the corporation. *Erie Railway Co. v. Commonwealth*, 351.
3. No surrender of the general power of taxation by any legislative act can be implied. *Id.*
4. The right of taxation is inherent in the sovereign. So far as it exists in a municipal corporation, it is by grant, and is called a franchise. *O'Byrne v. Mayor, etc., of Savannah*, 532.
5. A *de facto* government, which is able to maintain its supremacy by its armies, may exercise this power; and those who are subject to its control are bound to obedience. But if it assesses a tax, and is overthrown before it is collected, the rightful sovereign, whose power is established, will not enforce such assessment against the subjects of the government *de jure*. *Id.*

6. In such case, those who have paid the tax to the *de facto* government while it was supreme, have no means of recovering it back; and those who did not pay till its overthrow, are under no obligation to pay. *Id.*
7. A note given since the war to the mayor and council of Savannah, for tax assessed by the city authorities during the existence of the Confederate government, but not collected, is void for want of consideration. *Id.*
8. A note given for such tax, and for ground-rent due the city, by contract made prior to the war, is void as to the tax, but good as to the rent. The consideration is clearly severable, as the record shows precisely how much of it was for tax, and how much for rent. *Id.*

See BANK, 1.

TENANT IN COMMON.

- A. and B. and three others owned together a main aqueduct leading from a spring, and each one had his own branch aqueduct. In an action by A. against B. for using or wasting more than his fifth of the water, *held* (1), that case sounding in tort, and not an action of account, was the proper form of action; and (2) that the following charge to the jury was correct: "Did the defendant willfully and knowingly use or waste more than his one-fifth of the water, or knowingly suffer his family to do it, for the purpose of annoying or injuring the plaintiff, or with a wanton disregard or indifference to the inconvenience it might occasion the plaintiff? If the defendant did so, and thereby the plaintiff has suffered injury, then the defendant is liable." *McLellan v. Jenness*, 270.

TENDER.

See PAYMENT, 3.

TITLE.

- A court of equity will not interpose to remove a cloud from the title of an estate, held by possession for twenty years or more under the statute of possessions, for the reasons, among others, that the complainant has at law a remedy entirely adequate to his protection. *Taylor v. Staple*, 556.

See BURDEN OF PROOF.

TRADE MARK.

1. Any word or phrase used in circulars, price lists or advertisements, to designate a manufactured article, but not placed upon the article, does not constitute a trade mark. *Candee, Swan & Co. v. Deere & Co.*, 125.
2. The use of a trade mark consisting of the words "Candee, Swan & Co," in a semicircular form above the words "Moline, Ill," is no infringement upon a trade mark consisting of the words "John Deere," in a semicircular form above the words "Moline, Ill." *Id.*
3. The term "Moline," in "Moline plow," is generic, Moline being the name of the place where the plow is manufactured, and is not susceptible of exclusive use as a trade mark. *Id.*
4. The combinations of letters and figures, A No. 1, A X No. 1, No. 1, X No. 1, No. 3, and B No. 1, respectively, used originally for the purpose of designating the quality of manufactured articles, are not susceptible of exclusive use as a trade mark. *Id.*

INDEX.

TRANSFER OF CAUSE.

See REMOVAL OF CAUSE.

TRAVELER.

See EXCAVATION; HIGHWAY; RAILROAD COMPANY, 6.

TROVER.

See CHATTEL MORTGAGE, 1.

TRUST.

See ADMINISTRATOR.

VENDEE.

See CHATTEL MORTGAGE, 2.

VENDOR AND VENDEE.

See SALE, 1; STOPPAGE IN TRANSITU.

VOLUNTARY AGREEMENT.

1. As a general rule, a court of equity will not enforce a voluntary agreement, or perfect a merely promised or imperfect gift. There is *locus penitentis* as long as it is incomplete. *Taylor v. Staples*, 556.
2. Where the evidence adduced in support of a bill, for the specific performance of an alleged agreement to convey an estate, is adjudged by the court to show merely an intent on the part of a wealthy father, while in life, to give to his son that estate, which intent the father, from forgetfulness or some other cause, never executed, the bill will be dismissed with costs *Id.*
3. A father, possessed of great wealth, makes upon his account book an entry to the credit of a son, in these words: "By further allowance, to pay for house, etc., \$5,000;" and long after the death both of father and son the legal representatives of the son, by suit in equity, seek to recover from the legal representatives of the father the said sum, with interest from the date of said entry (May 30, 1837). *Held*, that the entry is but an indication of an intention on the father's part, and not a promise founded upon a consideration cognizable by a court of equity,—neither the fact that the father had trained up the son in idleness, as the heir presumptive of inexhaustible wealth; nor the fact that this "allowance" was consistent with a "family arrangement," existing at the date of said entry; nor the fact that, unless this claim of \$5,000 and interest were allowed and paid, would this son receive of his father's accumulations so much as was received by his brothers and sisters respectively, constituting a valuable consideration, upon which alone the court must act, unheeding a consideration merely "moral" or "meritorious." *Id.*

VOLUNTARY PAYMENT.

See PAYMENT, 1.

WAREHOUSEMEN.

See COMMON CARRIER, 1.

WARRANT.

See ARREST, 1.

WARRANTY.

See SALE, 1, 2.

WASTE.

See TENANT IN COMMON.

WATER PRIVILEGE.

The conveyance of a house and land by an ordinary warranty deed carries with it, by implication, the right which the grantor has to water running to the premises conveyed by an aqueduct from a distant spring; and a cotemporaneous special deed, to the grantee, of the water privilege, containing limitations and restrictions in the use thereof without the words "to his heirs, assigns, etc," will not be construed to modify the estate in the water and aqueduct so as to prevent it passing by deed of the premises from such grantee to succeeding grantees, and the latter may recover damages from the original grantor for cutting off the aqueduct on adjacent land, owned by him, and thus disturbing the water privilege. *Coolidge v. Hager*, 256.

See TENANT IN COMMON.

WILL.

An instrument in the form of a deed, which conveys all the property that the maker "may die possessed of," is a will, and is only admissible in evidence after due probate. *Brewer v. Baxter*, 530.

See ADEMPMENT; MUTUAL WILL; STATUTE OF LIMITATIONS, 3.

WITNESS.

1. When husband and wife are by statute excluded as witnesses "for or against each other," in an action against them for slanderous words spoken by the wife, she is a competent witness in her own behalf, and (ELLIOTT, J., dissenting) he is a competent witness in his own behalf. *Mousler v. Harding*, 196.
2. Embezzlement of county funds, by a tax collector, is not an infamous crime, although punished as such, and does not exclude the offender as a witness, even while undergoing sentence. *Schuylkill County v. Copley*, 441.

See SLANDER, 6.

WORDS.

"Death by his own hand," see INSURANCE, 16.

"Estimated cash value," see INSURANCE, 11.

"Extraordinary care," see RAILROAD COMPANY, 2.

"Valuable article," see ICE.

WRONG-DOERS.

See CONTRIBUTION, 1, 2, 3.

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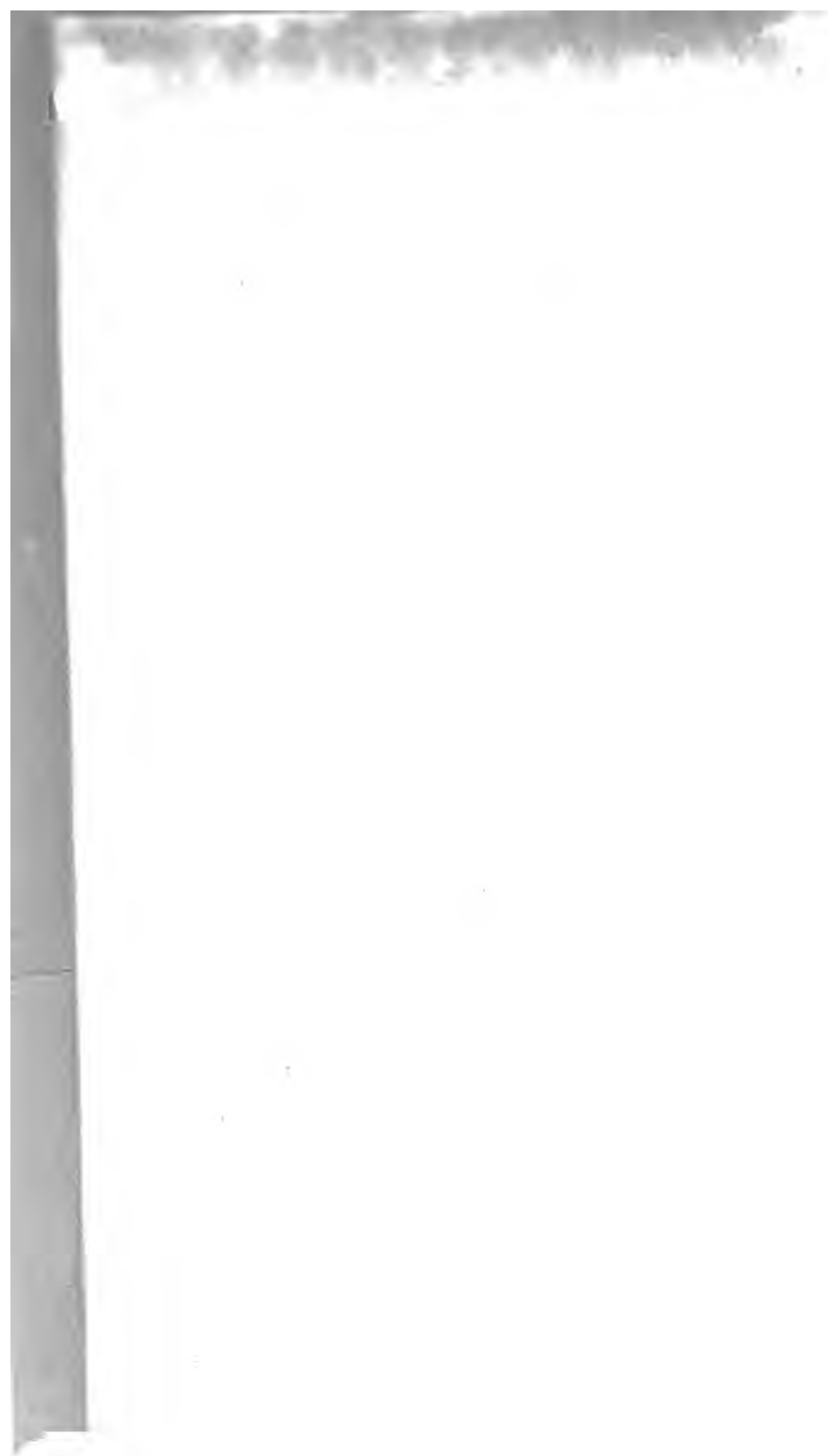
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